

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1985

OPINION NO. 85-1 Hazardous Waste Regulations—The Nevada Hazardous Waste Law does not preempt local regulation for facility siting or local regulation of hazardous waste which complements state law.

CARSON CITY, January 14, 1985

MR. WILLIAM G. RODGERS [sic], *District Attorney*, Lyon County, P.O. Drawer T, Yerington, Nevada 89447

DEAR MR. ROGERS:

QUESTION

You have asked our office a series of questions about the effect of the Nevada Hazardous Waste Disposal Law (NHWL), [NRS 459.400](#) through 459.600, upon Lyon County's authority to regulate hazardous waste and the siting of hazardous waste facilities. In addition to seeking guidance on these general issues, we understand your specific concern is whether the NHWL has preempted the county's authority to require a special use permit for the siting of a hazardous waste facility within an industrial district of the county.

ANALYSIS

In the circumstances present here, on April 24, 1984, Lyon County issued a special use permit for the siting of a hazardous waste facility. The permit requires the operator of the facility to comply with all applicable federal and state environmental requirements, allows inspection by county officials and is subject to continuous review. Presumably the condition of continuous review is to allow the county to revoke the permit if the facility fails to comply with permit conditions which incorporate the federal and state requirements. The special use permit does not contain conditions more stringent than under the federal-state hazardous waste management scheme.

To determine whether the NHWL preempts such local regulation, we must first discuss the nature and extent of the county's powers in the factual context of its actions. Second, we consider the county's authority in the context of the state and federal hazardous waste laws.

A county possesses only such powers as are specifically provided by statute. *Schweiss v. First Judicial District Court*, [23 Nev. 329](#), 332, 45 P. 289 (1986); *Caton v. Frank*, [56 Nev. 56](#), 69-70. 44 P.2d. 521 (1935). While Nevada Legislature has not expressly granted any authority to its political subdivisions over the management of hazardous waste, [NRS 244.357](#) authorizes counties to adopt and enforce sanitation regulations so long as they do not conflict with the general laws of the State. Likewise, the Legislature has vested counties with authority to impose land use controls. (See, generally [NRS Chapter 278](#).) *Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (Validity of zoning power upheld.)

Lyon County issues the special use permit pursuant to its zoning ordinances which require a special use permit for certain categories of operations, without singling out hazardous waste

facilities, in order to locate within a M-1 General Industrial District and provide a procedure for the consideration and determination of the special use application. Lyon County code of Zoning Ordinances, Chapters 20.60 and 20.78.

These zoning ordinances are based upon statutory authority to impose land use controls. [NRS 278.020](#) states in pertinent part:

1. For the purpose of promoting health, safety, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land and to control the location and soundness of structures.

Likewise, [NRS 278.250](#), in pertinent part, provides:

2. The zoning regulations shall be adopted in accordance with the master plan for land use and shall be designed:

(g) To ensure that the development on land is commensurate with the character of the land.

(h) To take into account the immediate and long-range financial impact of the application of particular land to particular kinds of development, and the relative suitability of the land for development.

(i) To promote health and the general welfare.

3. The zoning regulations shall be adopted with reasonable consideration, among other things, to the character of the area and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city, county or regions.

The county is also authorized to provide by ordinance for the granting of special use permits. [NRS 278.315](#).

The NHWL was enacted in 1981 by the Nevada Legislature. Enactment of laws like the NHWL by the states is specifically contemplated by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. RCRA was enacted in response to public concern over whether hazardous wastes were being handled and disposed of in a safe manner. By its provisions Congress authorized EPA to regulate hazardous waste management from cradle to grave, i.e., from the point of generation to a point well beyond actual disposal in order to ensure postdisposal safety. Under this regulatory scheme a permit is required for all storage, treatment or disposal facilities. But Congress also provided for the establishment of a federal-state regulatory partnership over hazardous wastes by providing that EPA may authorize a state hazardous waste program to replace its own if it is equivalent to EPA's program and consistent with federal requirements and other state programs. 42 U.S.C. § 6926(b), 40 CFR § 123.1(k), 123.7, 123.32.

The provisions of the NHWL generally track the provisions of RCRA and were enacted to allow Nevada to meet the federal requirements for authorization of the state program. Nevada has received interim authorization of the state program. Nevada has received interim authorization and has applied for final authorization from EPA. Upon such authorization, state regulation of hazardous waste will fully supersede direct federal regulation of hazardous waste management within the State.

The NHWL provides a system for regulation of the generation, transport, storage and disposal of hazardous wastes and mandates further that state agencies develop a statewide plan for hazardous waste management in cooperation with federal and local entities and with other states, and encourage the development of uniform state laws over the subject. [NRS 459.400](#); 459.475; 459.485. As part of its regulatory mandate, the State Environmental Commission (SEC) must

adopt regulations which govern the operation of treatment, storage and disposal facilities and which establish standards for the location, design and construction of such facilities, taking into account climatic and geological variations. [NRS 459.490](#)(4), (5), and (8). The SEC has implemented these requirements by adopting regulations which incorporate siting criteria set forth in EPA regulations promulgated under RCRA. These specify seismic and flood-plain considerations for locating facilities. 40 CFR § 264.18; 270.14.

As an aspect of its focus on hazardous waste management, the NHWL speaks only to standards for location of facilities. The law does not control the actual siting of any facilities; it does not create a State-regulated site-selection process nor in any other way speak to the siting of hazardous waste facilities. The subject of land use and actual siting of hazardous waste facilities is outside the scope of the NHWL, thus local control over that subject could not have been preempted. *County of Kendall v. Avery Gravel Co., Inc.* 445 N.E.2d 924 (Ill.App. 1983). As such, the county's jurisdiction over the actual location of hazardous waste facilities via the zoning-special use permit powers remains intact, in that actual facility siting was not a subject addressed by the Legislature when it enacted the NHWL. It is only when the Legislature adopts a general scheme for the regulation of a *particular* subject that local control over the *same subject* ceases. The purpose and *scope* of the legislative scheme evidences whether the Legislature intended to displace local control. *Lamb v. Mirin*, [90 Nev. 329](#), 332 (1974).

While the special-use permit issued by Lyon County does not impose requirements more stringent than those required under the NHWL, your questions relating to whether the county may regulate the management of hazardous waste pertain to whether the NHWL preempts the county from requiring more stringent requirements as a condition of granting a special-use permit. As such, the county would be regulating the same subject as the NHWL.

While for purposes of determining whether a state statute has preempted a particular local regulation the actual restriction involved must be known, our office can furnish some general guidance in response to your questions involving this subject.

The NHWL contains no express language of legislative intent to preempt local regulation of hazardous waste management. Neither does it contain any explicit recognition that such local authority is preserved. While [NRS 444.732](#) does provide for delegation of responsibility under the NHWL to local entities, only the authority to enforce regulations adopted by the SEC may be delegated. It does not purport to delegate any authority to adopt local regulations. Therefore, any legislative intent to preempt local regulation must be inferred from the total statutory scheme. Where it is clear that the effect of the ordinance would defeat the basic objectives of the state legislation or is contrary to the public policy it expresses, the courts will hold the ordinance preempted. *Antieu, Municipal Corporation Law* § 5.41, p. 5-123, citing *Chavez v. Sargent*, 329 P.2d 579, 584 (Cal.App. 1958). Finding preemption based on implicit legislative intent has been criticized on the grounds that the Legislature can simply state that it wishes no further local control.

Considering alternatives available, the difficulty of lawyers, legislators and judges defining the "field" and determining if it is "occupied" or preempted, and the unwholesome impact of voiding otherwise lawful municipal legislation, the doctrine should be rejected.

Antieu, supra, p. 5-126 (emphasis in original).

Nevertheless, the doctrine, driven by the practical need to resolve conflicts in the courts, retains vitality. The Nevada Supreme Court has invoked the preemption doctrine to resolve a conflict between a statutory authorization and a local prohibition involving taxicab regulation, *Lamb v. Mirin, supra*. (Local regulation prohibiting double-parking held preempted by statutory scheme which authorized double-parking.) The court used broad language to introduce its preemption analysis. "Whenever a legislature sees fit to adopt a general scheme for the

regulation of a particular subject, local control over the same subject, through legislation, ceases.” *supra* at 332. However, the court quickly focused its analysis on whether it was presented with a real policy conflict. “That which is allowed by the general laws of the state cannot be prohibited by local ordinance . . . [i]n no event may a county enforce regulations which are in conflict with the clear mandate of the legislature.” *Id.* at 333.

In deciding *Lamb v. Mirin*, the Supreme Court enunciated a test which focuses on the existence of a true conflict between a local regulation and a general comprehensive statutory scheme which can be determined either from the express provisions of the statute or from its whole purpose. As applied to local regulation of hazardous waste, this analysis dictates that the NHWL preempt any local regulation which is inconsistent with the provisions of the NHWL or is in conflict with the public policy which it expresses. The NHWL would preempt any local regulation such that compliance with its provisions would make compliance with state law or regulation a physical impossibility, as well as one which prohibited an activity specifically authorized by the NHWL. Both such local regulations would be inconsistent with the express provisions of the state scheme. Additionally the NHWL would preempt local regulation in conflict with the purposes of the NHWL as expressed in [NRS 459.400](#):

The purposes of [NRS 459.400](#) to [459.600](#), inclusive, are to:

1. Protect human health, public safety and the environment from the effects of improper, inadequate or unsound management of hazardous waste;
2. Establish a program for regulation of the storage, generation, transportation, treatment and disposal of hazardous waste; and
3. Ensure safe and adequate management of hazardous waste.

As explained above, the Nevada law complements the federal law. The principal purpose of both statutory schemes is to facilitate safe disposal of hazardous waste. Local regulation most likely to create a policy conflict with the statutory purpose would consist of total prohibitions or unreasonable restrictions on the transportation, treatment, storage or disposal of hazardous waste within a local jurisdiction. Such regulation, in addition to falling to a state-based preemption analysis, would also likely be invalidated under the Commerce Clause of the United States Constitution, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), as well as the Supremacy Clause, as being inconsistent with RCRA, *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971) *aff’d* mem. 405 U.S. 1035 (1972).

While the existence of a conflict may only be determined by the actual facts of each case, it is our opinion that the NHWL does not automatically preempt local siting regulations, special use permits, or hazardous waste regulations which contain reasonable restrictions and are not inconsistent with the provisions or the policy purposes of the NHWL.

In reaching our conclusion, we have considered several cases in other jurisdictions which have invalidated local regulation of siting hazardous waste facilities. *City of Rockford v. Illinois Pollution Control Board*, 465 N.E.2d 996 (Ill.App.2D 1984); *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 466 N.E.2d 102 (Mass 1984); *Stablex Corp. v. Town of Hookset*, 456 A.2d 94 (N.H. 1982). These judicial invalidations of local siting regulation occurred in the context of express state statutory schemes which included specified siting processes. The local siting decisions were inconsistent with that siting process. As explained above, the Nevada law does not create a siting process or otherwise extend to selection of actual locations for hazardous waste facilities. Therefore, no inconsistency is present.

For example, the New Hampshire statutes considered in *Stablex*, while not containing an elaborate siting process scheme, do provide that a municipal review committee submit a report to the state with its *recommendations* regarding the proposed facility including whether the site certificate should be granted and provides for a right of appeal by the committee of the state’s decision to grant a site permit. *Id.* at 101. This provision reinforces that, in New Hampshire, the

state permit process is the exclusive and sole means for permitting of hazardous waste facilities and no other permits or approvals are required. As such, local referendum and special use permit requirements are inconsistent with that process. Nevada has not elected to exercise state primacy over siting. Local control over siting facilities and local regulations of hazardous waste which complement state regulation do not undermine the State's primacy in administering hazardous waste facilities. So long as local regulation is consistent with the state scheme, the uniformity of the state scheme will not be jeopardized. While not containing express provisions to such effect, the NHWL contemplates that local authority over siting of facilities and adopting reasonable regulations will complement its objectives. When supported by legitimate safety interests it will be upheld. *City of New York v. Ritter Transportation*, 515 F.Supp. 663.

California's statutory provisions concerning this subject expressly provide much of what the NHWL implicitly recognizes; i.e., that state primacy over hazardous waste management is consistent with local primacy over land-use regulation. California statutes provide that local land-use regulation of existing facilities is not preempted, except that a local entity may not down-zone or unreasonably regulate an existing facility so as to prohibit its operation unless the state determines it to be a hazard. California Health and Safety Code (HSC) § 25147, 25149. California also explicitly recognizes that the state and local authority are independent of each other, but complementary by providing that the state may not refuse to issue a hazardous waste facility permit on the grounds that the facility has not received a local land-use permit. However, the state may provide that the facility permit is not effective unless a local land-use permit is obtained. California HSC § 25204.

Under Nevada law, we believe a similar result obtains. In response to your question on this point, we conclude that a state permit cannot be denied on the grounds that no local land-use permit has been obtained. However, possession of a state hazardous waste permit does not absolve an applicant from obtaining whatever local land-use permits may be required. This system of complementary controls facilities achievement of the legislative objectives of the NHWL.

CONCLUSIONS

Based on the discussion and analysis above, this office concludes as follows:

1. The provision of [NRS 278.020](#) and [278.250](#) grant authority to counties to manage hazardous waste as an aspect of their land-use powers, while [NRS 244.357](#) grants such authority as an aspect of their health and safety powers.
2. [NRS 459.480](#) does not expressly authorize a delegation of authority to allow counties to adopt regulations governing hazardous waste, it only authorizes delegation of authority to enforce the regulations of the SEC.
3. Generally speaking, reasonable local land-use or hazardous waste regulations are not preempted by NHWL unless they are inconsistent with its provisions, or regulations adopted thereunder, or conflict with its purposes. Regulations which unreasonably burden or prohibit siting or transport may also run afoul of the Commerce Clause and of the Supremacy Clause which underpins RCRA's interstate consistency requirement.
4. The State may issue a hazardous waste permit notwithstanding that a county has denied a special use permit. However, State issuance does not relieve the facility from obtaining whatever local land-use approvals are required.
5. The special use permit issued by Lyon County is not preempted by the NHWL in that it concerns the siting of a facility at a specific location and contains no restrictions which conflict with the provisions or the purposes of the NHWL.

Very truly yours,

BRIAN MCKAY, *Attorney General*

By GEORGE V. POSTROZNY, *Deputy Attorney General*

OPINION NO. 85-2 Animals; Fish and Game: Shooting of Birds Not Classified as Upland Game Birds at Shooting Parks Constitutes Cruelty to Animals—Nevada law permits the shooting of upland game birds at shooting preserves. A pigeon is not, however, an upland game bird. Consequently, unless the injury or killing of a pigeon is expressly permitted by statute, shooting these birds exclusively for sport is in violation of the statutes prohibiting cruelty to animals. [NRS 501.095](#) and [574.100-574.200](#).

CARSON CITY, February 22, 1985

THE HONORABLE THOMAS P. WRIGHT, *Storey County District Attorney*, Storey County
Courthouse, Post Office Box 496, Virginia City, Nevada 89440

DEAR MR. WRIGHT:

This letter is in response to a request by your predecessor in office for a formal opinion clarifying an informal letter issued by the Attorney General on July 19, 1984. Apparently, this request for a formal opinion was precipitated by some confusion concerning the interaction of Nevada statutes authorizing shooting preserves and those statutes declaring unlawful the unjustifiable injury, maiming, mutilation or killing of any animal.

FACTUAL BACKGROUND

The facts contained in the opinion request and the July 19, 1984, informal letter of the Attorney General may be summarized as follows. Certain individuals or corporations are presently operating a commercial or private shooting preserve in Storey County, State of Nevada. Among the activities conducted at these shooting preserves is the sport shooting of pigeons.

Apparently, the pigeons are shot after being launched by a mechanical device. Not all of the launched pigeons are necessarily killed during the sport shooting inasmuch as some birds may escape or only be wounded. Additionally, there are some allegations that the pigeons may be deprived of necessary food and water prior to being launched for the shoot.

QUESTION ONE

Whether a pigeon is an upland game bird subject to propagation, culture and maintenance upon a commercial or private shooting park.

ANALYSIS

Nevada statute provides that “[a]ny person who owns or controls the shooting rights or privileges on an enclosed tract of land may establish a commercial or private shooting preserve for the propagation, culture and maintenance of upland game birds pursuant to the provisions of this chapter and commission regulations.” [NRS 504.300](#) (1981). Upland game birds are “all species of the Order Galliformes, Tunamiformes and Columbiformes, except migratory game birds.” [NRS 501.095](#) (1983); [NAC 503.045](#)(1) (1984). Under Nevada law, the upland game bird classification includes those birds commonly known as grouse, partridge pheasant, quail,

tinamou and turkey. [NAC 503.045\(1\)\(a\)-\(f\)](#) (1984). To the extent that pigeons are classified by state regulations, wild doves and pigeons are considered migratory game birds. See [NAC 503.045\(2\)](#) (1984). Any other type of pigeon is an unprotected bird. [NAC 503.055\(1\)](#) (1984).

Because the pigeon is not an upland game bird, these birds may not be the subject for propagation, culture and maintenance upon a commercial or private shooting preserve as delineated in section 504.300 of the statutes. Moreover, as a migratory game bird, the shooting of wild pigeons is governed by the state hunting statutes and regulations. See [NRS 503.090-503.245](#) (1981); [NAC 503.142-503.185](#) (1984).

CONCLUSION

State statute permits any person to establish a shooting preserve subject to Chapter 504 of the Nevada Revised Statutes and state regulation. Shooting preserves only may be established for the propagation, culture and maintenance of upland game birds. A pigeon is not an upland game bird and, therefore, may not be the subject of a shooting preserve. Moreover, the shooting of wild pigeons, a migratory game bird, is subject to Nevada's hunting laws.

QUESTION TWO

Whether the practice of shooting pigeons at a shooting park or preserve constitutes the unjustifiable injury, maiming, mutilation or killing of any animal which is declared unlawful by section 574.100 of the Nevada Revised Statutes.

ANALYSIS

[NRS 574.100](#) declares as a misdemeanor any act or omission of a person who:

1. Overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether belonging to himself or to another;
2. Deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink;
3. Causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink;
4. Willfully sets on foot, instigates, engages in, or in any way furthers an act of cruelty to any animal, or any act tending to produce such cruelty; or
5. Abandons an animal in circumstances other than those prohibited in [NRS 54.110](#).

[NRS 574.100\(1\)-\(5\)](#) (1981). In this context, an animal includes every living creature excluding the human race. [NRS 574.050\(1\)](#) (1981). Undeniably, a pigeon is an animal subject to the protections of [NRS 574.050](#).

Recognizing that not every injury inflicted upon or death caused to an animal is improper, Nevada's cruelty to animals statutes may not be applied in a manner which would:

1. Interfere with any of the fish and game laws contained in Title 45 of NRS or any laws for the destruction of certain birds.
2. Interfere with the right to destroy any venomous reptiles or animals, or any animal known as dangerous to life, limb or property.
3. Interfere with the right to kill all animals and fowl used for food.
4. Prohibit or interfere with any properly conducted scientific experiments or

investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college or university of this state.

5. Interfere with any scientific or physiological experiments conducted or prosecuted for the advancement of science or medicine.

[NRS 574.200](#)(1)-(5) (1981).

Considering the provisions of [NRS 574.200](#) in light of the present inquiry, the injury of killing or pigeons at a shooting park or preserve can have only three justifications. First, the shooting of pigeons is permissible if conducted in conformity with the fish and game laws of this State. As discussed above, pigeons are not within the class of birds subject to upland game bird shooting preserves. *See* text at page 8, *supra*. Accordingly, the provisions of Title 45 do not exempt the shooting of nonmigratory game pigeons from the cruelty to animals statutes.

Second, the killing of pigeons may be justified if performed in the course of destroying any animal known as dangerous to life, limb or property. Nevada law sanctions cooperative programs between the federal government, state agencies, any county, city or other political subdivision of this State, as well as private persons or entities “in suppressing vertebrate pests. . . .” [NRS 555.021](#) (1983); *see also* [NRS 555.010](#) (1983). A vertebrate pest is “any animal of the subphylum vertebrata, except predatory animals, which is normally considered to be a pest, such as a gopher, ground squirrel, rat, mouse, starling or blackbird. . . .” [NRS 555.005](#)(3) (1983).

Undoubtedly, a species of pigeon not protected as a migratory game bird may be declared a vertebrate pest subject to destruction by government programs. *See* [NRS 555.005](#)(3) (1983). *See also* [NRS 503.595](#) (1981) (destruction of wildlife by Nevada Department of Wildlife where private property damage or destruction is occurring); [NRS 567.080](#) (1983) (crop-destroying birds may be destroyed by government program). The killing or injury of pigeons at a private shooting park, however, does not constitute a State approved means of pest control. On this subject, the Attorney General previously concluded that aside from the destruction of pigeons in an approved pest control program, Nevada’s cruelty to animals statute prohibits the unjustifiable maiming, injuring or mutilation of the pigeons subject to misdemeanor punishment. *See* Letter to Mark S. McGuire from Harry W. Swainston 2 (dated July 19, 1984). The earlier informal letter poignantly noted:

. . . It cannot be denied that maiming, injuring and mutilation are inflicted on the pigeons that become live targets for the pigeon shooting activity . . . described. As the infliction of these injuries cannot be justified in connection with the killing of the pigeons, we are of the opinion that there is no basis, in fact or in law, for their infliction and, therefore, they are unjustifiable.

You have suggested in some of the appended materials to your letter that the pigeons, prior to being released and shot at, are deprived of necessary food and water. We also identify this practice, if true, as a misdemeanor violation as provided in [NRS 574.100](#).

Id. at 2. The Attorney General continues to adhere to the previous unofficial comments expressed on July 19, 1984.

Finally, the killing of pigeons is not subject to the cruelty to animals statute provided the pigeons killed are used for food. [NRS 574.200](#)(3) (1981). The facts available to this office do not indicate whether the pigeons killed at the subject shooting parks or preserves were consumed after being killed. Assuming the pigeons were used for food, Chapter 574 would have no application to the activity which is conducted in Storey County.

CONCLUSION

Unless exempted by the provisions of [NRS 574.200](#), the shooting of pigeons for sport

constitutes the unjustifiable injury, maiming, mutilation or killing of an animal which is subject to misdemeanor criminal sanctions. Without question, the sport shooting of pigeons does not qualify as an experiment conducted for the advancement of science or medicine. Nor does this activity qualify as a governmentally approved pest control project.

Sport shooting of nonmigratory game pigeons is likewise unrecognized as a hunting activity sanctioned by Nevada law. Only where pigeons which are not classified as migratory game birds are killed for use as food is the subject shooting activity outside the prohibition of the cruelty to animals statutes. The protections accorded to nongame birds by Nevada's cruelty to animals statute is consistent with the jurisprudence of the Western United States for nearly a century. *See, e.g., Waters v. People*, 46 P. 112, 113-115 (Colo. 1896). *See also Oregon Game Fowl Breeders Assoc. v. Smith*, 516 P.2d 499 (Ore. 1974). Consequently, should a local district attorney reasonably determine that pigeons are being subjected to unjustifiable injury or killing as discussed above, criminal prosecution of the violators would be appropriate under Nevada law.

Sincerely,

BRIAN MCKAY, *Attorney General*

By DAN R. REASER, *Deputy Attorney General*

OPINION NO. 85-3 County Clerks; Elections; Voter Registration—[NRS 293.530](#)(1) authorizes the use of all reliable and reasonable means to correct official voter registration lists. [NRS 293.540](#)(9) does not require that the county clerk give notice to persons whose voter registration is canceled pursuant to that subsection.

CARSON CITY, March 14, 1985

THE HONORABLE WILLIAM A. MADDOX, *Carson City District Attorney*, 208 North Carson Street, Carson City, Nevada 89701-4298

DEAR MR. MADDOX:

You have requested our opinion concerning the Carson City Clerk's practice of correcting the voter registration list by cancellation of registration affidavits. The facts supplied to us with your request are summarized in the "analysis" portion of this opinion.

QUESTIONS

1. Are there any limits to the discretion exercised by the county clerk acting pursuant to [NRS 293.530](#) in correcting the official registration lists and determining whether a registered voter's current residence is other than that indicated on his affidavit of registration?
2. Is there any requirement that the county clerk give notice to persons whose voter registration is canceled in accord with [NRS 293.540](#)(9) based on information discovered by the clerk pursuant to [NRS 293.530](#)?

ANALYSIS

Following the 1984 general election the Carson City Clerk engaged in his usual practice of correcting the voter registration lists. You relate that the Carson City Clerk, acting pursuant to [NRS 293.530](#) and [293.540](#), exercised his right to correct the official voter registration lists to

reflect a voter's proper residence. One of the means by which the clerk accomplished this task was by use of information received on or with returned juror questionnaires.

You state that occasionally a juror questionnaire is returned with a note that states that the prospective juror no longer resides in Carson City, but now lives in Reno or some other location outside of Carson City. You indicate that when the Carson City Clerk receives this kind of information he exercises his rights pursuant to [NRS 293.530](#) and [293.540\(9\)](#) by canceling the affidavit of registration of that voter and correcting the official registration list to reflect this cancellation. You point out that neither [NRS 293.530](#) nor [NRS 293.540](#) require that notice be given to the registered voter prior to canceling that voters' registration affidavit and entering that cancellation on the official registration list. Based on the lack of any statutory requirement that notice be given, you have informed us that the Carson City Clerk does not give notice when cancellation is made pursuant to these two provisions of our election statutes.

The procedure outlined in the preceding paragraph sometimes results in a person discovering that he or she is no longer registered when he or she attempts to vote at the next election. This problem is occasionally complicated by the fact that some people are not residents of Carson City for purposes of serving on a jury, but as students or armed services personnel are nonetheless eligible to vote in Carson City by virtue of constitutional and statutory provisions. See Nev. [Const. art. 2, § 2](#) and [NRS 293.487](#) and [293.490](#). The problems outlined in this paragraph prompted your posing the two questions to us which are set out above.

The Carson City Clerk's statutory authorization to correct the official registration lists is contained in [NRS 293.530](#). That section provides:

1. County clerks *may use any reliable and reasonable means available to correct official registration lists* and determine whether a registered voter's current residence is other than that indicated on his affidavit of registration.
2. A county clerk *may, with the consent of the board of county commissioners, make investigations of registration in the county by house-to-house canvass, or by any other method.* (Emphasis added).

It is our opinion that the text of [NRS 293.530](#) supplies the resolution to your first question. When the language of a statute is plain, its meaning must be deduced from that language and we may not go beyond the language of the statute. See *Robert E. v. Justice Court*, [99 Nev. 443](#), 445, 664 P.2d 957 (1983) and *City of Las Vegas v. Macchiaverna*, [99 Nev. 256](#), 258, 661 P.2d 879 (1983).

The Carson City Clerk may use any reliable and reasonable means to correct the official registration list. Furthermore, the Carson City Clerk may, with the consent of the board of supervisors, make investigations of registration in Carson City by any method in addition to the two methods of census and canvass listed in [NRS 293.530\(2\)](#). When the Carson City Clerk uses the information contained in or noted on juror questionnaires to determine whether voter registration affidavits require cancellation and the official registration lists require correction, past experience should indicate to the clerk that while this information may be one reasonable means of determining whether a voter's current residence is other than that indicated on the affidavit of registration, it is not always reliable information, particularly with respect to armed services personnel and students. Consequently, the Carson City Clerk should consult other reasonable and reliable sources of information and, if necessary, conduct investigations, approved by the board of supervisors, to determine that the information contained in or noted on juror questionnaires reasonably and reliably indicates that a voter's current residence is other than that indicated on the affidavit of registration.

The language of [NRS 293.530](#) provides county clerks with great latitude in determining the sources of information from which to correct official registration lists. However, county clerks must use means that are reasonable *and* reliable as sources of this type of information. When

experience shows that a particular means of making this determination may be reasonable but not always reliable, the county clerk is required by [NRS 293.530](#) to develop other sources of information to insure reliability in the correction process. This may include having to secure approval for the investigation procedures authorized by [NRS 293.530\(2\)](#).

Chapter 293 of the Nevada Revised Statutes contains a comprehensive group of statutory provisions which pertain to the cancellation of a voter's registration affidavit. It is our opinion that examination of the text of these provisions supplies the answer to your second question. Our reading of the applicable provisions of Chapter 293 of the Nevada Revised Statutes leads us to conclude that no notice is statutorily required when cancellation of a voter's registration affidavit is made pursuant to [NRS 293.540\(9\)](#).

In Chapter 293 of the Nevada Revised Statutes the Legislature has required that certain notices be given when a voter's registration affidavit is canceled under particular circumstances. When an elector moves from one county to another in this State and registers to vote in the second county, the county clerk of the second county is required to give to the first county clerk notice to cancel the registration in that county. See [NRS 293.527](#). When a county clerk receives an affidavit from an elector or other reliable person which contains facts establishing the grounds for voter registration cancellation as contained in [NRS 293.535\(1\)\(a\)](#) to (c), inclusive, the county clerk is required to give notice to the voter for whom cancellation is sought in accord with the notice requirements contained in [NRS 293.535\(2\)](#). Finally, when a voter fails to vote in any general election which is grounds for cancellation of registration pursuant to [NRS 293.549\(8\)](#), the county clerk is required to give notice to the voter whose registration has been canceled in accord with the notice requirement contained in [NRS 293.545\(2\)](#). This listing of notice requirements is merely illustrative of the point that the Legislature has carefully specified when notice of cancellation of voter registration must be given.

When the Legislature has specifically listed particular circumstances in which some type of notice of cancellation is required, we think it is significant that in other circumstances cancellation of voter registration is authorized by statute, but no notice is required to be given. Correction of official registration lists in accord with [NRS 293.530\(1\)](#) and cancellation of voter registration pursuant to [NRS 293.549\(9\)](#) constitutes one of several circumstances when the cancellation of a voters' affidavit of registration may be performed by the county clerk and no statutory notice requirement is applicable. Presumably, the lack of a statutory notice requirement may be justified in this circumstance because this type of cancellation is based on the development of reliable information by the county clerk through the use of reasonable means and this information may, in certain instances, be augmented by information developed through an investigation conducted pursuant to [NRS 293.539\(2\)](#).

We are required to adopt a construction of statutes that will harmonize all parts of enactments passed by our Legislature. *Nevada State Dept. of Motor Vehicles v. Turner*, [89 Nev. 514](#), 517 P.2d 1265 (1973). The entire statutory scheme must be construed as a whole. *Acklin v. McCarthy*, [96 Nev. 520](#), 523, 612 P.2d 219 (1980). The provisions of the whole act must be construed in light of its purpose. *20th Century Hotel v. County of Clark*, [97 Nev. 155](#), 157, 625 P.2d 576 (1981). Consequently, the justification for the lack of a statutory notice requirement in the context of a voter registration cancellation made in accord with [NRS 293.530](#) and [293.549\(9\)](#) discussed in the preceding paragraph is not only plausible but gives proper effect to the distinctions made by the Legislature of when notice is required and when it is not. We are not permitted to "will" the law through statutory interpretation by requiring that notice be given when a cancellation is made pursuant to [NRS 293.549\(9\)](#). Our responsibility is to "discern" the law consistent with legislative intent. See *Mann v. State*, [96 Nev. 62](#), 65, 605 P.2d 209 (1980).

These cancellation of voters registration statutes balance the need for rules to test the qualifications of an elector against the prohibition of abridging a person's right to vote based on unreasonable, impartial and nonuniform requirements. See *Cirac v. Lander County*, [95 Nev. 723](#), 730, 602 P.2d 1012 (1979). We cannot say that the distinctions drawn by the Legislature of

when notice is required and when it is not in the context of voter registration cancellation are unreasonable, impartial or lack uniformity.

CONCLUSION

The Carson City Clerk may use a wide variety of information sources to correct the official voter registration lists provided that the means of correction are reasonable and reliable within the meaning of [NRS 293.530\(1\)](#) and provided that the clerk uses approved investigation procedures authorized by [NRS 293.530\(2\)](#) when circumstances dictate that these procedures are warranted.

There is no statutory requirement that the Carson City Clerk give notice to persons whose voter registration is canceled in accord with [NRS 293.549\(9\)](#) based on information discovered by the clerk pursuant to [NRS 293.530](#).

Sincerely,

BRIAN MCKAY, *Attorney General*

By SCOTT W. DOYLE, *Deputy Attorney General*

OPINION NO. 85-4 Taxation—Deferred Property Taxes on Agricultural Lands—The filing of a final subdivision map is not a conversion to a higher use within the meaning of [NRS 361A.280](#).

CARSON CITY, April 9, 1985

THOMAS F. RILEY, ESQ., *Chief Deputy District Attorney*, Office of the District Attorney, Washoe County Courthouse, P.O. Box 11130, Reno, Nevada 89520

DEAR MR. RILEY:

You have requested our opinion of the phrase “converted to a higher use” as the same appears in the first sentence of [NRS 361A.280](#) which deals with the collection of deferred property taxes on agricultural lands.

In your request, you have explained that Washoe County, among other counties in Nevada, is experiencing rapid growth and development. Much of the land which has received agricultural use assessment pursuant to [NRS Chapter 361A](#) is being subdivided. Some of the new subdivisions are at present only “paper subdivisions” awaiting the sale of lots and an actual physical change in character. Such “paper subdivisions” are still being assessed as agricultural lands until there is an actual, physical change of the property to a “higher use.” Because of this taxation practice, where property has received agricultural use assessment for seven or more years prior to recording a subdivision map, each additional year of agricultural assessment subsequent to the creation of a “paper subdivision” results in the dropping of one year’s deferred taxes pursuant to [NRS 361A.280](#).

You have included with your request your own legal analysis of this provision and your conclusion that the recording of a final subdivision map of land previously subject to agricultural use assessment is a “conversion to a higher use” because such recording allows immediate development of the land to a “higher use.”

QUESTION

Is the subdivision of agricultural real property receiving an agricultural assessment a conversion to a higher use within the meaning of [NRS 316A.280](#)?

ANALYSIS

[NRS 361A.280](#) provides for the payment of a deferred tax and penalty when property is converted to a “higher use” and for the attachment of a lien for amounts owed:

1. When agricultural or open-space real property which is receiving agricultural or open-space use assessment is *converted to a higher use*, there shall be added to the tax extended against the property on the next property tax statement, an amount equal to the sum of the of the following:

(a) The deferred tax, which is the difference between the taxes paid or payable on the basis of the agricultural or open-space use assessment and the taxes which would have been paid or payable on the basis of the taxable value determination for each year in which agricultural or open-space use assessment was in effect for the property, up to 84 months immediately preceding the date of conversion from agricultural or open-space use. The 84-month period includes the most recent year of agricultural or open-space use assessment but does not include any period before July 1, 1976.

(b) A penalty equal to 20 percent of the accumulated deferred tax for each year in which the owner failed to give the notice required by [NRS 361A.270](#).

2. The deferred tax and penalty are a perpetual lien until paid as provided in [NRS 361.450](#); but if the property is not converted to a higher use within 84 months after the date of attachment, the lien for that earliest year then expires.

3. Each year a statement of liens attached pursuant to this section must be recorded with the county recorder by the tax receiver in a form prescribed by the department upon completion of the tax statement.

4. If agricultural or open-space real property receiving agricultural or open-space use assessment is sold or transferred to an ownership making it exempt from taxation ad valorem, a lien for a proportional share of the deferred taxes that would otherwise have been due in the following year, attaches on the day preceding the sale or transfer. The lien must be enforced against the property when it is converted to a higher use, even though the owner at the time of conversion enjoys an exemption from taxation. (Emphasis added.)

Thus, when property receiving the benefits of the lower agricultural or open-space assessment is “converted to a higher use,” computation of the deferred tax is triggered.

[NRS 361A.020](#) defines “agricultural real property” to mean “land devoted exclusively for at least 3 consecutive years immediately preceding the assessment date to agricultural use; or activities which prepare the land for agricultural use, and having a greater value for another use than for agricultural use. . . .”

“Agricultural use” is defined to mean:

. . . the current employment of real property as a business venture for profit, which business produced a minimum gross income of \$2,500 from agricultural pursuits during the immediately preceding calendar year by:

(a) Raising, harvesting and selling crops, fruit, flowers, timber and other products of the soil;

(b) Feeding, breeding, management and sale of livestock, poultry, fur-bearing animals or honeybees, or the produce thereof; or

(c) Dairying and the sale of dairy products.

The term includes every process and step necessary and incident to the preparation and storage of the products raised on such property for human consumption or for marketing except actual market locations.

2. As used in this section, “current employment” of real property in agricultural use includes:

(a) Land lying fallow for 1 year as a normal and regular requirement of good agricultural husbandry; and

(b) Land planted in orchards or other perennials prior to maturity.

[NRS 361A.030.](#)

Applying this definition of “agricultural use,” a county assessor looks to the “current employment” of the real property at issue to determine whether the owner is eligible for the deferred taxation program provided for in [NRS Chapter 361A](#). Although the filing of a final subdivision map does indicate intent on the part of the owner to convert the use of his land, this filing, without an actual physical change, may not preclude continued employment of the property in agricultural use.

The issue of eligibility for deferred taxation based on agricultural use was addressed in *Santa Fe Land Improvement Company v. Illinois Property Tax Appeal Board*, 448 N.E.2d 3 (Ill.App.3dDist. 1983). The facts underlying this case are as follows: Utilities were constructed and water and sewer lines were installed. Roads were constructed as well as a railroad spur line. *Id.* at 4.

Although the tract in *Santa Fe Land* was zoned industrial and industrial park sites were being marketed, the land itself was being farmed. According to the facts before the court, all tillable land was being used to grow corn, soybeans and wheat by three different tenants operating under crop share leases. The leases had terms and all contained provisions for the purchase of crops and for conversion of the leaseholds to industrial use. Farm buildings including farm residences were the only buildings on portions of the property which had not been sold as industrial sites. *Id.*

The plaintiff in *Santa Fe Land* applied for valuation under the applicable section of the Illinois Revenue Statutes (Ill.Rev.Stat. 1975, ch. 120, ¶ 501a-1) which requires that property be “devoted primarily to the raising and harvesting of crops.” The defendant Illinois Property Tax Appeal Board argued that despite the fact that the property was currently being farmed, the property owner intended to use the land for industrial development and that the leases had been prepared to facilitate industrial use. This, they argued, compels the conclusion that the land is not used solely for the growing and harvesting of crops. *Id.* at 5.

The Illinois court rejected defendant’s arguments:

... it is the *use* of real property which determines whether it is to be assessed at an agricultural valuation. The statutory sections do not speak of possible alternative uses nor intended future uses. That the scheme of taxation is based on present use is well-illustrated by the recapture provision of section 20a-3 of the Act (Ill.Rev.Stat. 1975, ch. 120, ¶ 501a-3) When property ceases to be used for agricultural purposes, an additional tax must be paid as if the property had been assessed at its fair market value for the preceding three years. The differential is thus based on the increased value of the land stemming from the nonagricultural use. If the legislature had intended for a “transitional” valuation, such as the one at bar, to be effected, it could have so provided in lieu of the recapture. We therefore conclude that the *present use* of land determines whether it receives an agriculture or nonagricultural valuation. This being the case, the lands in question which in 1978 were farmed and had not been sold as industrial development sites were used solely for the growing and harvesting of crops. In so holding, we

recognize that lands which were not farmed in 1978 and which were improved primarily to serve industrial landowners may appropriately be valued on a nonagricultural basis. *Id.* at 5, 6. (Emphasis added.)

Although the act of recording a final subdivision map evidences an intent on the part of the owner to change the character of his land, such filing is not irrevocable. (See, [NRS 278.490](#).) Land which has been subdivided on paper can still be subject to exclusive agricultural use. Because a county assessor determines agricultural use according to the “current employment” of the land pursuant to [NRS 361A.030](#), a physical change consistent with the final subdivision map is necessary to constitute a conversion to a higher use within the meaning of [NRS 361A.280](#).

CONCLUSION

Based on the foregoing, it is our conclusion that the phrase “converted to a higher use” in [NRS 361A.280](#) requires an actual, physical change in the use of property. This conclusion is consistent with the definition of “agricultural use” contained in [NRS 361A.030](#).

Sincerely,

BRIAN MCKAY, *Attorney General*

By MARTA ADAMS, *Deputy Attorney General*

OPINION NO. 85-5 Traffic Law; County Government—[NRS 484.257](#) does not prohibit reasonable county regulation of horse-drawn vehicles using certain highways.

CARSON CITY, April 29, 1985

S. MAHLON EDWARDS, *Deputy District Attorney*, Clark County, Nevada, Clark County Courthouse, Las Vegas, Nevada 89155

DEAR MR. EDWARDS:

This opinion is written in response to your request of April 8, 1985.

QUESTION

Does the Board of County Commissioners have the authority to prohibit a business providing rides for hire in horse-drawn vehicles from using any or all of the highways in that county?

ANALYSIS

Counties are political subdivisions of the State. *State ex rel. List v. County of Douglas*, [90 Nev. 272](#), 524 P.2d 1271 (1974); *County of Pershing v. Sixth Judicial District Court*, [43 Nev. 78](#), 181 P. 960, 183 P. 314 (1919). They derive their authority wholly from the Legislature. *County of Pershing*, 43 Nev. at 78; *Schweiss v. First Judicial District Court*, [23 Nev. 226](#), 45 P. 289 (1896). County ordinances are inferior and subordinate to state statutes, and when the two conflict the latter prevail. *Lamb v. Mirin*, [90 Nev. 329](#), 526 P.2d 80 (1974); *Terry v. City of Portland*, 20 Or. 478, 269 P.2d 544 (1954).

The Legislature has given counties the authority to enact certain traffic regulations.

[NRS 484.777](#)(2) provides: Unless otherwise provided by specific statute, any local authority may enact by ordinance traffic regulations which cover the same subject matter as the various sections of this chapter if the provisions of the ordinance are not in conflict with this chapter. . . .

[NRS 484.779](#) provides: 1. Except as provided in subsection 3¹, a local authority may adopt, by ordinance, regulations with respect to highways under its jurisdiction within the reasonable exercise of the police power: . . .

(e) Adopting such other regulations related to specific highways as are expressly authorized by this chapter.

[NRS 244.357](#) provides: 1. Each board of county commissioners may enact and enforce such local police and sanitary ordinances

¹“3. An ordinance enacted under this section is not effective with respect to (a) Highways constructed and maintained by the department of transportation under the authority granted by Chapter 408 NRS . . . until the ordinance has been approved by the board of directors of the department of transportation.”

and regulations as are not in conflict with the general laws and regulations of the State of Nevada . . .

4. . . . each board of county commissioners may, by ordinance, regulate:

(a) All vehicular, pedestrian and other traffic within the unincorporated area of the county and provide generally for the public safety on public streets . . . and the public rights of way.

The Legislature has also given counties the authority to enact certain business regulations.

[NRS 244.335](#) provides: 1. . . . the board of county commissioners may (a) regulate all character of lawful trades, callings, industries, occupations, professions and business conducted in its county outside of the limits of incorporated cities and towns.

These sections of the Nevada Revised Statutes give a county the authority to enact an ordinance regulating the horse-drawn vehicles so long as the ordinance does not conflict with another section of NRS. The section which suggests a possible conflict is [NRS 484.257](#). It reads: “Every person riding an animal or driving any animal-drawn vehicle upon a highway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle, except those provisions which by their nature can have no application.”

Before we can conclude whether or not a conflict exists, we must know what this statute means. In determining the meaning of a statute, the goal is to deduce the intention of the Legislature. *Gibson v. State*, [88 Nev. 382](#), 498 P.2d 1314 (1972). If the language of the statute is clear and plain, we must deduce the Legislature’s intent from the language itself and not from any outside source. *Demosthenes v. Williams*, [97 Nev. 611](#), 637 P.2d 1203 (1981); *Brown v. Davis*, [1 Nev. 409](#) (1865). Since the scope of [NRS 484.257](#), and the meaning intended for words like “rights” and “duties” cannot easily be gleaned by reading this section alone, we must apply the pertinent rules of statutory construction. *Copeland v. Woodbury*, [17 Nev. 337](#), 30 P. 1006 (1883).

There is a presumption that every part of an act was enacted for a purpose. *McMillin v. State*,

158 Colo. 183, 405 P.2d 672. An act should be read as a whole so as to make all of its parts effective. *20th Century Hotel and Casino, Ltd. v. County of Clark*, [97 Nev. 155](#), 625 P.2d 576 (1981); *Board of School Trustees v. Bray*, [60 Nev. 345](#), 109 P.2d 274 (1941); *State v. Logan*, [1 Nev. 110](#) (1865). Statutes should be interpreted so as to arrive at a reasonable and common sense construction. *Sheriff of Washoe County v. Smity*, [91 Nev. 729](#), 542 P.2d 440 (1975); *State ex rel. Keith v. Dayton & Virginia Toll Road Company*, [10 Nev. 155](#) (1875).

[NRS 484.257](#) was enacted in 1969 as section 79 of A.B. 271. 1969 Nev. Stat. 1476, 1482. The primary purpose of A.B. 271 was to establish traffic laws. This bill was referred to as the Rules of the Road Law by its drafters. Staff of the Assembly Committee on Transportation, Minutes of Meetings of the 1969 Session, p. 6, 2/26/69. [NRS 484.777](#) and [NRS 484.779](#) were likewise enacted as part of A.B. 271. 1969 Nev. Stat. 1476, 1482, 1488.

Applying these rules to these facts, it is apparent that [NRS 484.257](#) does not mean that animals and animal-drawn vehicles have the absolute right to travel any highway that is open to motor vehicles. To read the section this way is to nullify those portions of [NRS 484.777](#) and [NRS 484.779](#) which grant counties the right to regulate traffic. Reading the statute this way also reaches an absurd result, because such an interpretation would allow horse-drawn wagons on freeways and other high speed, limited access thoroughfares. Obviously, the Legislature could not have intended this.

A common sense interpretation of [NRS 484.257](#), and an interpretation that gives effect to the relevant other sections of that chapter, is that persons using animal-powered transportation have the same rights and duties, *under the traffic laws*, as do persons using motorized transportation. On highways where animal transportation is permitted, drivers of animals have the duty to obey traffic signs, police officers, and authorized flagmen. They have the duty to drive on the correct side of the road, yield to emergency vehicles, and so on. Drivers of animals have the right to expect other drivers to obey the rules of the road as to them: to yield the right of way when this is appropriate, to stop and report accidents, et cetera.

With the Legislature's intended meaning of [NRS 484.257](#) now clearly in focus, we can apply the test worked out by the courts for deciding whether an ordinance conflicts with a statute. That test states that such an ordinance is one which prohibits an act which the statute permits, or permits an act which the statute prohibits. *Belle v. Town Board of Onondaga*, 61 A.D.2d 352, 402 N.Y.S.2d 677 (1978); *Terry v. Portland*, 269 P.2d 544. Since the proposed ordinance will prohibit a business offering rides for hire in horse-drawn vehicles from using some county highways, it will not conflict with [NRS 484.257](#). That statute deals with a completely different subject: the applicability of the rules of the road to animal transportation. It does not deal with the subject of which highways are open to animal transportation, nor with the subject of which businesses may be conducted upon county highways. Therefore, the ordinance does not prohibit an act permitted by State statute, and the two will not conflict.

The board of county commissioners probably cannot bar this business from *all* county highways, however. Regardless of whether the board bases its ordinance upon its traffic regulation authority or on its business regulation authority, the regulation must be reasonable. The scope of such police power regulations is limited by the Nevada and United States Constitutions. *State v. Glusman*, [98 Nev. 412](#), 651 P.2d 639 (1982), *appeal dismissed*, 459 U.S. 1192, 103 S.Ct. 1170, 75 L.Ed.2d 423 (1982); *Kuban v. McGimsey*, [96 Nev. 105](#), 605 P.2d 623 (1980); *State ex rel. List v. AAA Auto Leasing & Rental, Inc.*, [93 Nev. 483](#), 568 P.2d 1230 (1977). Such regulations must be reasonably related to a legitimate governmental interest. *Duke Power Company v. Carolina Environmental Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *New Orleans v. Dukes*, 427 U.S. 197, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Kuban v. McGimsey*, [96 Nev. 105](#); *Ottenheimer v. Real Estate Division*, [91 Nev. 338](#), 535 P.2d 1284 (1975).

There are probably some highways in Clark County where horse-drawn vehicles could operate without posing a hazard to the health, safety and welfare of the public. Banning them

from these roads would probably be unconstitutional. The Board of County Commissioners can, however, constitutionally ban these vehicles or this business from the highways on which their operation does endanger the health, safety and welfare of the public. Of course, in making such a decision, a good record should be made.

As stated earlier in footnote No. 1, some ordinances regulating traffic on highways constructed and maintained by the Department of Transportation must be approved by the board of directors of the Department of Transportation. For a thorough analysis of the applicability of this requirement, please see Attorney General Opinion No. 83-12 (September 13, 1983).

CONCLUSION

The Nevada Legislature has granted counties the authority to regulate both traffic and businesses. Pursuant to this authority, a county could ban a business giving rides for hire in horse-drawn vehicles from county highways if this ban were rationally related to a legitimate governmental interest. Such an ordinance would not conflict with [NRS 484.257](#), because the two laws deal with different subject matters. The proposed ordinance will deal with what highways animal-powered vehicles can operate on, while [NRS 484.257](#) is concerned with the applicability of the traffic laws, i.e., the rules of road, to these vehicles, when legally operating where they are authorized to be.

Sincerely,

BRIAN MCKAY, *Attorney General*

By WILLIAM E. ISAEFF, *Chief Deputy Attorney General*

OPINION 85-6 Nevada Ethics in Government Law; Public Officers—Candidates for public office and public officers making statements of financial disclosure shall disclose by name each source of income reportable in accord with [NRS 281.571\(2\)](#). Generic description and disclosure of these sources of income is insufficient.

CARSON CITY, June 21, 1985

LARRY D. STRUVE, *Vice Chairman*, Nevada Executive Ethics Commission, 201 South Fall Street, Room 321, Carson City, Nevada 89710

DEAR MR. STRUVE:

You have sought our opinion concerning the proper interpretation of the financial disclosure requirements imposed by the Nevada Ethics in Government Law and the Financial Disclosure Statement being distributed by the Nevada Executive Ethics Commission.

QUESTION

What degree of specificity must the candidate or public officer use in completing question 11 on the Financial Disclosure Statement distributed by the Nevada Executive Ethics Commission in order to satisfy the statutory financial disclosure requirements contained in [NRS 281.571\(2\)](#)?

ANALYSIS

You have been contacted by a local government officer concerning the proper manner in which to complete the Financial Disclosure Statement distributed by the Nevada Executive Ethics Commission. Question 11 on the Financial Disclosure Statement requires that each public officer disclose each source of his income or that of any member of his household which constitutes ten (10) percent or more of his gross income or that of any member of his household for the preceding taxable year. The text of the question goes on to note that the public officer is not required to disclose the dollar amount of any income received from each “source” identified. Furthermore, the public officer completing the Financial Disclosure Statement is merely required to list the general source of income, such as “professional services.”

The local government officer who contacted you apparently receives a reportable source of income from dividends or interest produced by certain stocks, bonds and municipal securities. This officer has asked whether question 11 on the financial disclosure form requires that the name of each corporate entity in which the person owned stocks, bonds or other securities be disclosed in order to comply with the reporting requirements or whether a more generic description of the income source would be sufficient, such as “stocks, bonds and municipal securities.”

The question and instructions form the Financial Disclosure Statement find their basis in law in the provisions of [NRS 281.571](#). That statute provides in pertinent part:

Statements of financial disclosure shall be made in such form as the commission prescribes and shall contain the following information concerning the candidate or public officer:

...
(2) Each source of his income, or that of any member of his household, which constitutes 10 percent or more of such person’s gross income for the preceding taxable year. No listing of individual clients, customers or patients is required, but if such is the case a general source such as “professional services” must be disclosed.

The wording of the statutory provision just quoted would require that the candidate completing a Financial Disclosure Statement specifically identify each source of his income or that of any member of his household which constitutes ten (10) percent or more of such person’s gross income for the preceding taxable year. The only statutory exception to this requirement of specific identification of income sources is in the instance where income is derived from the rendition of professional services. In that instance, the person completing the financial disclosure statement merely indicates the generic description of the income source. The officer is not required to list individual clients, customers or patients.

The financial disclosure provisions of the current Nevada Ethics in Government Law have not been interpreted by our State Supreme Court. In 1975, our State Legislature enacted the predecessor of the current Ethics in Government Law. That legislative enactment was the subject of a declaratory judgment action in district court in which it was held that the 1975 Ethics in Government Law was unconstitutional. In the case of *Dunphy v. Sheehan*, [92 Nev. 259](#), 549 P.2d 332 (1976), our State Supreme Court affirmed that the financial disclosure provisions contained in the 1975 Ethics in Government Law were unconstitutionally vague. The court invalidated the entire 1975 Ethics in Government Law because the court held that the financial disclosure provisions could not be severed from the balance of the act. Although the 1975 ethics legislation was invalidated based on vagueness, our court briefly addressed the permissible extent of financial disclosure based on a right to privacy analysis, stating:

The plaintiffs in this case have also asserted that the financial disclosure provisions unconstitutionally invade their right to privacy. Having found such provisions unconstitutionally vague, we need not and do not express our view upon the privacy

issue.

Proceeding on the assumption, however, that the legislature may elect, at some future time, to restructure the Ethics Law to correct infirmities, it is useful, perhaps, to note in passing that the California Supreme Court has, in certain circumstances, recognized that a public officer's personal financial affairs are private to him and beyond the reach of governmental inquiry. *City of Carmel-by-the-Sea v. Young*, 466 P.2d 225 (Cal. 1970). In that case the statute required disclosure of the *extent* of the officer's investments, as distinguished from disclosure of the source or identity thereof. The Court found a violation of a right of privacy and struck down the statute as unconstitutional.

Moreover, we note that a New Jersey court invalidated the requirement that the economic interests of the officer's spouse and dependent children be disclosed. *Lehrhaupt v. Flynn*, 323 A.2d 527 (N.J.Super.Ct. 1974). This, also, should be given studied consideration if the law is to be restructured. (Emphasis in original.)

Dunphy v. Sheehan, supra, 92 Nev. at 264-65.

We interpret the language quoted from *Dunphy v. Sheehan, supra*, to mean that if confronted again with the issue our court would probably hold that specific disclosure of the source of income is constitutionally permissible, but any requirement that specific dollar values of each source of income be disclosed would transcend the scope of the legitimate governmental interest in eliminating and preventing conflicts of interest.

The traditional challenge to governmental ethics laws which require specific disclosure of financial interests has been that these provisions violate the official's right of privacy, but our research indicates that in those jurisdictions which have adopted financial disclosure legislation courts have overwhelmingly rejected such constitutional attacks. See *Goldtrap v. Askew*, 334 So.2d 20 (Fla. 1976); *Illinois State Employees' Association v. Walker*, 315 N.E.2d 9 (Ill. 1974), *cert. denied sub nom., Troopers Lodge #40 v. Walker*, 419 U.S. 1058 (1974); *Stein v. Howlett*, 289 N.E.2d 409 (Ill. 1972), *appeal dismissed*, 412 U.S. 925 (1973); *Montgomery County v. Walsh*, 336 A.2d 97 (Md. 1975), *appeal dismissed*, 424 U.S. 901 (1976); *Klaus v. Minnesota State Ethics Commission*, 244 N.W.2d 672 (Minn. 1976); *Fritz v. Gorton*, 517 P.2d 911 (Wash. 1974), *appeal dismissed*, 417 U.S. 902 (1974) and *In re Kading*, 235 N.W.2d 409, (Wis. 1975). Cf. *City of Carmel-by-the-Sea v. Young*, 466 P.2d 225 (Cal. 1970) and *Advisory Opinion on Constitutionality of 1975 Public Act 227*, (Questions 2 through 10), 242 N.W.2d 3 (Mich. 1976).

With the exception of the California and Michigan opinions, these cases have uniformly rejected right of privacy challenges to financial disclosure legislation which requires specific identification of the sources of income. It should be noted that the California Supreme Court subsequently upheld California's 1973 conflict of interest law against a right of privacy challenge in *County of Nevada v. MacMillan*, 522 P.2d 1345 (Cal. 1974). The courts considering the constitutionality of financial disclosure legislation in the context of a right of privacy challenge have disagreed in two areas.

The first of these areas of judicial disagreement is the validity of disclosure requirements which require revealing the names of clients or patients. *Falcon v. Alaska Public Offices commission*, 570 P.2d 469 (Alaska 1977) enjoined disclosure of a doctor-official's patients until narrowing regulations were implemented because of the patients' right to privacy. *Ballou v. State Ethics commission*, 424 A.2d 983 (Pa. Commw. 1981) held that the financial disclosure provisions of the Pennsylvania Ethics Act, as applied to attorneys, were unconstitutional as an infringement on the state supreme court's exclusive power to govern the conduct of persons licensed to practice law in Pennsylvania. On the other hand, *Chamberlin v. Missouri Elections Commission*, 540 S.W.2d 876 (Mo. 1976) sustained a disclosure law requiring attorneys to identify the sources of their income as against attorney-client privilege and over breadth objections. The Nevada Ethics in Government Law has statutorily resolved this controversy by

relieving the officer completing the Financial Disclosure Statement from listing individual clients, customers or patients and instead requiring that the officer describe such income sources as “professional services.”

The second area of judicial disagreement concerns financial disclosure legislation requirements which compel disclosure of a spouse’s or minor child’s financial interests. *Lehrhaupt v. Flynn*, 323 A.2d 537 (N.J.Super.Ct. 1974), *aff’d*, 356 A.2d 35 (App.Div. 1976) held invalid an ordinance mandating full financial disclosure by township officials of a spouse’s or a minor children’s assets and liabilities. On the other hand, our research indicates that the more pervasive judicial attitude is that statutory requirements mandating full financial disclosure by public officials of a spouse’s or a minor child’s financial interests is constitutionally sustainable against a right of privacy challenge. See *Denoncourt v. Commonwealth State Ethics Commission*, 457 A.2d 213 (Pa.Comm.w. 1983); *Gideon v. Alabama State Ethics Commission*, 379 So.2d 570 (Ala. 1980) and *Opinion of the Justices to the Senate*, 376 N.E.2d 810 (Mass. 1978).

It is our perception of the rather extensive legal authority on the issue that [NRS 281.571\(2\)](#) properly and permissibly seeks specific disclosure of each source of income of a candidate or public officer or any member of that candidate’s or officer’s household which constitutes ten (10) percent or more of such person’s gross income for the preceding taxable year. In the circumstances where a source of income which is subject to disclosure is earned through the rendition of “professional services,” our statute properly authorizes a generic description of the income source rather than a listing of the individual clients, customers or patients.

With the foregoing considerations in mind, we must determine what constitutes a reportable “source” of income. This issue is resolved by resort to a basic rule of statutory construction. The rule of interpretation applicable to this issue is that we must give the words of a statute their plain and ordinary meaning unless the context clearly requires otherwise. *In the Matter of Filippini*, [66 Nev. 17](#), 24, 202 P.2d 535 (1949); *Ex Parte Zwissig*, [42 Nev. 360](#), 178 P. 20 (1919). “Source” is generally defined as the generative source or point of origin for something. See *Webster’s Seventh New Collegiate Dictionary* (1969) p. 835. In the case of the local government officer whose inquiry prompted your request, this officer would be required to report by name those stocks, bonds and municipal securities which produced dividend or interest income which constitutes ten (10) percent or more of his gross income or that of any member of his household for the preceding taxable year.

Some examples may provide assistance in explaining what is statutorily required. A public officer holds a portfolio of several stocks, bonds and municipal securities which collectively produced ten (10) percent or more of his gross income for the preceding taxable year. However, none of his stock, bond or municipal security holdings individually produces income which constitutes ten (10) percent or more of his gross income. None of these holdings is reportable pursuant to [NRS 281.371\(2\)](#). The public officer is also *not* required to make a generic description and disclosure of this income source from the portfolio by an entry on his report of “stocks, bonds and municipal securities.”

If this same public officer holds a portfolio of several stocks, bonds and municipal securities which collectively produced ten (10) percent or more of his gross income for the preceding taxable year *and* one or more of the individual holdings in the portfolio produced ten (10) percent or more of his gross income for the preceding taxable year, those individual holdings would have to be specifically identified and reported pursuant to [NRS 281.371\(2\)](#). If one of those holdings was shares of stock in Widget Corporation, the officer would have to identify his stock interest in that corporation by specifically naming Widget Corporation. A general entry of “stock” would be insufficient. In the same vein, if a second holding consisted of municipal securities in Anytown, U.S.A., which also produced ten (10) percent or more of his gross income for the preceding taxable year, these bonds would also be reportable by specific identification of the Anytown, U.S.A., municipal bonds. A general entry of “municipal bonds” would be insufficient.

However, the public officer is not required to make a generic description and disclosure of the remaining income sources from the portfolio by an entry on his report of “stocks, bonds and municipal securities.”

CONCLUSION

In responding to question 11 contained in the Nevada Executive Ethics Commission Financial Disclosure Statement, a public officer is required to list the specific source of income which is subject to disclosure except in the circumstance where the income is earned through the rendition of professional services. This type of disclosure requirement has been found to be constitutionally permissible as against a right of privacy challenge in other jurisdictions. The rationale for this interpretation was well stated in *Witt v. Morrow*, 139 Cal.Rptr. 161 (Cal.App. 1977) when the court determined that implementation of the conflict of interest laws requires that the public know the name of the individual or enterprise creating the conflict. If the public did not know the name of the entity in which the officer had a financial interest, the possible conflict of interest would never be brought to light. We agree with this reasoning and do not find it to be inconsistent with the *orbiter dictum* contained in *Dunphy v. Sheehan*, *supra*.

Only stock, bond or municipal security holdings which individually produced ten (10) percent or more of the officer’s gross income or that of any member of the officer’s household for the preceding taxable year are subject to reporting pursuant to [NRS 281.571\(2\)](#). However, reportable sources of income must be specifically identified for the reasons discussed in the preceding paragraph. Generic descriptions such as “stocks, bonds and municipal securities” are insufficient.

Our interpretation of [NRS 281.571\(2\)](#) will be of use to the newly consolidated Ethics commission since this subsection was not amended in any substantive manner with the passage and approval of Senate Bill 345 during the 63rd session of the Nevada Legislature.

Sincerely,

BRIAN MCKAY, *Attorney General*

By SCOTT W. DOYLE, *Chief Deputy Attorney General,*
Civil Division

OPINION 85-7 Motor Vehicles—Conviction of Driving While License Revoked or Suspended—Actual notice to the accused of the suspension or revocation of his driver’s license is not an element of the misdemeanor of driving while license suspended or revoked and evidence that notice was mailed pursuant to [NRS 484.385\(3\)](#) and [484.385\(4\)](#) is sufficient to sustain a conviction.

CARSON CITY, June 21, 1985

THE HONORABLE JAMES E. WILSON, JR., *Elko County District Attorney*, Elko County
Courthouse, Elko, Nevada 89801

Attention: JOHN S. MCGIMSEY, *Deputy District Attorney*

DEAR MR. WILSON:

This office has received your letter dated May 6, 1985, wherein you requested an opinion

regarding the necessity of a defendant receiving actual notice of the suspension or revocation of his driver's license before he can be convicted of driving while his license was suspended or revoked. Specifically you asked whether the mailing of a notice provided by [NRS 484.385](#)(4) is sufficient to secure a conviction notwithstanding that it was not received by the defendant, and whether the presumption of notice is overcome by the sworn testimony of the defendant that he did not receive notice. An analysis of this issue requires a review of certain facts, related statutes and case law.

BACKGROUND

The situation you described provides a good basis for analysis. First, we assume that a driver was stopped in Nevada by a police officer who has an articulable suspicion or reasonable grounds to believe that the person had been driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance. Several different scenarios can arise at this point:

Example 1. The police officer requests the driver to take a preliminary test of his breath at the scene pursuant to [NRS 484.382](#) and advises the driver that his failure to submit will result in the immediate revocation of his privilege to drive. The driver refuses to take the test. The officer then serves an order of revocation of the license, permit, or privilege to drive on the individual and seizes his license or permit to drive.¹ The officer advises the driver of his right to administrative and judicial review of the revocation and his right to have a temporary license if he wants one which is only effective for seven days including the date of issuance. The officer then forwards to the Department of Motor Vehicles (Department) the seized license or permit and a written certification that he served an order of revocation on the driver and issued him a temporary license.

Example 2. The police officer requests the driver to take an evidentiary test of his blood, breath, or urine pursuant to [NRS 484.383](#) and advises him that a failure to submit to the test will result in the revocation of his privilege to drive. This is commonly known as the Nevada Implied Consent Law. The driver either refuses or elects to take a breathe test with a result of 0.10 or more percent by weight or alcohol in his blood. The officer then serves an order of revocation of the license, permit, or privilege to drive on the individual and follows the steps outlined in Example 1.

Example 3. The police officer advises the driver of the Nevada Implied Consent Law and the driver elects either a blood or urine test. The officer does not serve an order of revocation on the driver at the time because the officer does not know the result of the blood or urine test. The officer later receives the result of the test which indicates that the driver had 0.10 percent or more by weight of alcohol in his blood. The officer immediately prepares and sends to the Department, together with a copy of the test result, a written certificate that the officer had reasonable grounds to believe that the individual had been driving a vehicle with 0.10 percent or more by weight of alcohol in his blood as determined by the chemical test.

¹A police officer will not seize an out-of-state driver's license but will only serve an order revoking the out-of-state driver's privilege to drive in Nevada.

Upon receipt of the certificate and test result, the Department issues an order revoking the person's license, permit, or privilege to drive by mailing the order by certified mail to the person at his last known address on file with the Department, which order becomes effective five days

after mailing. The order indicates the grounds for the revocation, the period during which the person is not eligible for a license, and states that the person has a right to administrative and judicial review of the revocation and has the right to administrative and judicial review of the revocation and has the right to a temporary license.

Example 4. A driver who has his license revoked under Examples 1, 2, or 3 receives a temporary license and proceeds to hearing or judicial review under [NRS 484.387](#). The hearing officer or the judge either affirms the prior order of revocation or continues the hearing at the request of the driver. Accordingly, the Department sends the driver either a notice of affirmation of the prior order of revocation or a cancellation of the temporary license by mailing it by certified mail to the last known address of the driver on file with the Department.

The above examples delineate how a person would be notified that his license, permit, or privilege to drive had been revoked or how he would be notified that his temporary license had been canceled. In Examples 1 and 2 the person would have actual notice at the time he either refused to take a test or took the breath test. Accordingly, a person revoked under the facts set forth in Examples 1 and 2 would be hard pressed to contest a charge of driving with a revoked license² on the grounds that he did not have knowledge of the revocation.

By contrast, in Examples 3 and 4, the person might or might not have actual notice of the revocation and presumably this is the person contesting the charge of driving with a revoked license on the grounds that he didn't have knowledge of the revocation. The inquiry you have raised as to whether the mailing of the notice under [NRS 484.385\(4\)](#) is sufficient to sustain a conviction of driving while revoked despite the fact the notice was not received by the defendant arises in this context.

QUESTION PRESENTED

Whether actual notice to the accused of the suspension or revocation of his driver's license is an element of the misdemeanor of driving while license suspended or revoked and whether evidence that notice was mailed pursuant to [NRS 484.385\(4\)](#) is sufficient to sustain a conviction.

ANALYSIS

There are several relevant statutes on this issue, the first being [NRS 483.560](#) which states in pertinent part:

1. Except as provided in subsection 2, any person who drives a motor vehicle on a highway or on premises to which the public has

²For purposes of economy, revoked license includes the terms revoked permit and revoked privilege to drive.

access at a time when his driver's license has been canceled, revoked or suspended is guilty of a misdemeanor.

2. If the license was suspended, revoked or restricted because of a violation of [NRS 484.379](#), [484.3795](#), [484.384](#) or homicide resulting from driving a vehicle while under the influence of intoxicating liquor or a controlled substance, or the violation of a law of any other jurisdiction which prohibits the same conduct, he shall be punished by imprisonment in jail for not less than 30 days nor more than 6 months, and by a fine of

not less than \$500 nor more than \$1,000. No person who is punished under this section may be granted probation and no sentence imposed for such a violation may be suspended. No prosecutor may dismiss a charge of such a violation in exchange for a plea of guilty or of nolo contendere to a lesser charge or for any other reason unless, in his judgment, the charge is not supported by probable cause or cannot be proved at trial.

[NRS 483.570](#) refers to nonresidents and states that “no person whose driving privilege as a nonresident has been canceled, suspended or revoked, as provided in [NRS 483.010](#) to [483.630](#), inclusive, shall drive any motor vehicle upon the highways of this state while such privilege is canceled, suspended or revoked.”

The above statutes set forth the misdemeanor of driving while revoked or suspended. The next relevant statute is [NRS 484.385](#) which sets forth the revocation procedure for persons who are driving while intoxicated:

1. As agent for the department, the officer who directed that a test be given under [NRS 484.382](#) or 484.383 or who obtained the result of such a test shall immediately serve an order of revocation of the license, permit or privilege to drive on a person who fails to submit to the test or has 0.10 percent or more by weight of alcohol in his blood, if that person is present, and shall seize his license or permit to drive. The officer shall then advise him of his right to administrative and judicial review of the revocation and to have a temporary license, and shall issue him a temporary license on a form approved by the department if he requests one, which is effective for only 7 days including the date of issuance. The officer shall immediately transmit the person’s license or permit to the department along with the written certificate required by subsection 2.

2. When a police officer has served an order of revocation of a driver’s license, permit or privilege on a person pursuant to subsection 1, or later receives the result of an evidentiary test which

³It is acknowledged that there are other statutes under which drivers are suspended or revoked but this opinion will focus on revocations for driving while intoxicated since [NRS 484.385](#) was the statute cited in the inquiry. The analysis, however, should be applicable to persons suspended under other statutes.

indicates that a person, not then present, had 0.10 percent or more by weight of alcohol in his blood, the officer shall immediately prepare and transmit to the department, together with the seized license or permit and a copy of the result of the test, if any, a written certificate that he had:

(a) An articulable suspicion that the person had been driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance and that the person refused to submit to a required preliminary test;

(b) Reasonable grounds to believe that the person had been driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance and the person refused to submit to a required evidentiary test; or

(c) Reasonable grounds to believe that the person had been driving or in actual physical control of a vehicle with a 0.10 percent or more by weight of alcohol in his blood, as determined by a chemical test. The certificate must also indicate whether the officer served an order of revocation on the person and whether he issued the person a

temporary license.

3. The department, upon receipt of such a certificate for which an order of revocation has not been served, after examining the certificate and copy of the result of the chemical test, if any, and finding that revocation is proper, shall issue an order revoking the person's license, permit or privilege to drive by mailing the order to the person at his last known address. The order must indicate the ground for the revocation and the period during which the person is not eligible for a license, permit or privilege to drive and state that the person has a right to administrative and judicial review of the revocation and to have a temporary license. The order of revocation becomes effective 5 days after mailing.

4. Notice of an order of revocation and notice of the affirmation of a prior order of revocation or the cancellation of a temporary license provided in [NRS 484.387](#) is sufficient if it is mailed to the person's last known address as shown by any application for a license. The date of mailing may be proved by the certificate of any officer or employee of the department of motor vehicles, specifying the time of mailing the notice. Such a notice is presumed to have been received upon the expiration of 5 days after it is deposited, postage prepaid, in the United States mail.

[NRS 484.387](#) sets forth the procedure for administrative and judicial review of an order of revocation and the viability of a revocation during the administrative and judicial process and states in pertinent part:

1. At any time while a person is not eligible for a license, permit or privilege to drive following an order of revocation issued pursuant to [NRS 484.385](#), he may request in writing a hearing by the department to review the order of revocation, but he is only entitled to one hearing. The hearing must be conducted within 15 days after receipt of the request, or as soon thereafter as is practicable. . . . *The department shall issue an additional temporary license for a period which is sufficient to complete the administrative review.*

2. The scope of the hearing must be limited to the issue whether or not the person failed to submit to a test or had 0.10 percent or more by weight of alcohol in his blood at the time of the test. *Upon an affirmative finding on this issue, the department shall affirm the order of revocation.* If a negative finding is made on the issue, the order of revocation must be rescinded.

3. If, after the hearing, the order of revocation is affirmed, the person whose license, privilege or permit has been revoked is entitled to a review of the same issue in district court in the same manner as provided by [NRS 483.520](#). *The reviewing court may issue a stay of the revocation upon appropriate terms if a substantial question is presented for review which is supported by affidavits or relevant portions of the record of the hearing. The court shall notify the department upon the issuance of a stay and the department shall issue an additional temporary license for a period which is sufficient to complete the review.*

4. If a hearing officer grants a continuance of a hearing at the request of the person whose license was revoked, or a court does so after issuing a stay of the revocation, the officer or court shall notify the department, and *the department shall cancel the temporary license and notify the holder by mailing the order of cancellation to his last known address.* (Emphasis added.)

In analyzing the question of whether actual notice to the accused of his revocation or suspension is a necessary element of the misdemeanor of driving while license revoked or suspended, we could find no Nevada cases on point, and a review of the case law in other

jurisdictions reveals a split of authority on the issue. We believe the better reasoned opinions hold that actual notice is not required because the offense does not require criminal intent but is “*malum prohibitum*,” and the state need only show that notice was mailed to the defendant. *State v. Thomas*, 610 P.2d 937 (Wash. 1980), *State v. Buen*, 509 P.2d 865 (Ore. 1973), *Hodges v. State*, 649 P.2d 775 (Okla. 1982), *State v. Kindler*, 466 A.2d 984 (N.J. 1983), *State v. Wenoff*, 246 A.2d 59 (N.J. 1968), *State v. Cattanach*, 271 A.2d 828 (Vt. 1970), *State v. Pueschel*, 303 A.2d 117 (Conn. 1973), *State v. Baltromitis*, 242 A.2d 99 (Conn. 1967), *State v. Johnson*, 139 N.W.2d 157 (N.D. 1965), *State v. Garst*, 123 N.W.2d 638, (Neb. 1963).

It is within the power of a state to prohibit its licensees from doing an act irrespective of knowledge or ignorance on their part of the facts which make their conduct criminal. Such statutes are within the exercise of police power for the protection of valid interests in the public safety. When so designed, the question of intention is immaterial. *State of Vermont v. LaBonet*, 144 A.2d 792 (Vt. 1958), *State v. Cattanach*, supra. Intent to do the prohibited act, not intent to violate the criminal law, is the only intent requisite for conviction in the case of many crimes constituting violation of statutes in the nature of police regulations. *State v. Gaetano*, 114 A. 82 (Conn. 1921), *State v. Baltromitis*, supra. Neither is there any constitutional impediment to the enactment of a criminal statute in which “*mens rea*” is not an element. *Morss v. Forbes*, 132 A.2d 1, *State v. DeMeo*, 118 A.2d 1, *Williams v. North Carolina*, 325 U.S. 226, 238, (1944), *State v. Wenoff*, supra.

Similarly, in Nevada the Legislature may make the doing of certain acts criminal without regard to the intent of the person committing the act. *State v. Zichfield*, [23 Nev. 304](#), *State v. Clark*, [32 Nev. 145](#), *State v. Pansey*, [61 Nev. 330](#). When a statute forbids the doing of a certain thing and is silent concerning the intent with which the thing is done, a person who does the forbidden act is guilty of the crime charged, even though he had no wrongful intent beyond that involved in doing the prohibited act. *State v. Zichfield*, supra, *State v. Clark*, supra. In the case of driving with a revoked license, the forbidden act would be driving the vehicle without a valid license.

The suspension and revocation of drivers’ licenses arise out of the police powers of the State to protect the public safety, and [NRS 483.560](#) and [483.570](#) are the statutes designed to enforce the public safety concerns of keeping suspended and revoked drivers off the roadways. Accordingly, those statutes may make driving while suspended or revoked a criminal act without regard to the intent of the driver.

A review of these statutes leads us to the conclusion that actual notice to the accused of the suspension or revocation of his driver’s license is not necessary in order to sustain a conviction for driving while the license is revoked because intent is not an element of the crime. The Legislature in enacting these statutes did not include a requirement of knowledge or willfulness as exists in other jurisdictions such as California.⁴ Nevada’s statute simply requires the act of driving while revoked and makes no reference to state of mind. Further, [NRS 484.385](#) makes the order of revocation effective five days after it is mailed, presumes that it is received 5 days after mailing, and evidences a legislative intent to have the revocation effective regardless of receipt.

A case that is instructive on this point is *State v. Cattanach*, 271 A.2d 828 (Vt. 1970) because its statutes are similar to Nevada’s.⁵ In that case the commissioner of motor vehicles sent the defendant by certified mail a copy of an order suspending the defendant’s license. The certified

⁴California’s Vehicle code § 14601 provides that “(a) No person shall drive a motor vehicle upon a highway at any time when his driving privilege is suspended or revoked and the person so driving has knowledge of either such fact. . . .” (Emphasis added.)

⁵23 V.S.A. § 674(a) provides:

A person whose license or whose right to operate a motor vehicle has been revoked,

suspended or refused by the commissioner of motor vehicles shall not

letter was not claimed by the defendant and was returned to the commissioner as “unclaimed.” In the interim, defendant was stopped for a traffic offense and was arrested for operating a motor vehicle while his license was suspended. At trial, the defendant testified that he had no notice of the suspension which was the sum and substance of his defense. The trial court instructed the jury that they should not be concerned with whether the defendant had actual notice of the suspension of his license, and that it was sufficient to sustain a verdict of guilty if the commissioner of motor vehicles had notified the defendant of the suspension of his license by written notice, by registered or certified mail directed to the defendant’s last known address. The defendant objected to this instruction and appealed his conviction to the Vermont Supreme Court.

The court in upholding the conviction found that actual knowledge was not an essential ingredient of the offense proscribed by 23 V.S.A. § 674(a), driving with a suspended license:

Unlike the wording of similar statutes in some other jurisdictions, § 674(a) makes *no reference to knowledge, wilfulness, or intentional wrongdoing*. Compare, *In re Murdock*, 68 Cal.2d 313, 66 Cal.Rptr. 380, 437 P.2d 764, 766. The omission of words of such import is significant of the legislative intent. And the related provision in § 204, which makes the suspension effective three days after demand for surrender is deposited in the United States mails, without regard to delivery, lends strong support to a legislative purpose to eliminate the requirement of actual notice as an essential ingredient of the offense. Otherwise, the suspended operator might continue to operate indefinitely and avoid or postpone responsibility for such misconduct. See, *In re Murdock*, supra, 66 Cal.Rptr. at 383, 437 P.2d at 767 (Dissenting opinion). (Emphasis added.)

These considerations are persuasive that the omission of any reference to conscious wrongdoing in 23 V.S.A. § 674(a) was made with a legislative purpose. And the courts are not at liberty to supply a requirement which the lawmakers have deliberately omitted. *State of Vermont v. Fox*, 122 Vt. 251, 255, 169 A.2d 356.

operate or attempt to operate a motor vehicle upon a public highway until the right of such person to operate motor vehicles has been reinstated by such commissioner by subsequent license of otherwise.

23 V.S.A. § 204 provides:

A person whose license to operate a motor vehicle, or whose motor vehicle registration is suspended or revoked by the commissioner under the provisions of this title shall surrender forthwith his license or registration upon demand of the commissioner of his authorized inspector or agent. Such demand shall be made in person or by *notice in writing sent by registered or certified mail to the last known address of such person, and such suspension or revocation shall be deemed to be in full force and effect upon the making of such demand, if made in person, or three days after the deposit of such notice in the United States mails, if made in writing*. (Emphasis added.)

Likewise, in Nevada the courts should not read into the statute a requirement that the Legislature omitted. The statutory scheme in Nevada is so similar to the statutory scheme in

Vermont that the reasoning quoted above is persuasive in interpreting the Nevada statutes.

Another case that is instructive on this issue is *State of Minnesota v. Johnnie Green*, 351 N.W.2d 42 (Minn.App. 1984), where the court reversed the conviction of the defendant who never received actual notice of the suspension of his driver's license because the relevant statute had a requirement of willfulness.⁶ Prior to the case being decided by the court, the legislature amended the statute to delete any reference to willfulness and to specifically state that notice was sufficient if mailed to the last known address of a person and that the failure to file a change of address with the Post Office of the Department of Public Safety would not be a defense to a charge of operating a vehicle with a canceled, suspended, or revoked license.⁷ The court indicated that if the amended legislation had been in effect at the time of defendant's arrest, it probably would have decided the case differently. This analysis is helpful because the court had the opportunity to compare the two statutes and determine that it was the requirement of willfulness alone that required the state to prove the defendant had received actual notice of his suspension, and that without such a requirement, actual notice would not be required.

⁶Minn. Stat. § 171.24 (1982), which provides:

Any person whose driver's license or driving privilege has been canceled, suspended or revoked who disobeys such order by operating any motor vehicle, the operation of which requires a driver's license, upon the highways in this state while such license or privilege is canceled, suspended, or revoked is guilty of a misdemeanor.

It is misdemeanor for any person to *willfully violate* any of the provisions of *this chapter* unless such violation is by any law declared to be a felony or a gross misdemeanor. (Emphasis added.)

⁷Minn. Stat. § 171.24 was amended to include the following:

Any person whose driver's license or driving privilege has been cancelled, suspended or revoked and who had been given notice of, or *reasonably should know* of the revocation, suspension or cancellation, and who disobeys such order by operating anywhere in this state any motor vehicle, . . . is guilty of a misdemeanor.

Notice of revocation, suspension, or cancellation is *sufficient* if personally served, or *if mailed by first class mail to the person's last known address or to the address listed on the person's driver's license*. . . . It is not a defense that a person failed to file a change of address with the post office or failed to notify the Department of Public Safety of a change of name or address as required under section 171.11. (Emphasis added.)

Minn. Stat. § 171.241 was enacted as part of the new scheme:

It is a misdemeanor for any person to willfully violate any of the provisions of this chapter *unless* the violation is declared by any law to be a felony or gross misdemeanor, or *the violation is declared by a section of this chapter to be a misdemeanor*. (Emphasis added.)

A corollary argument running through the cases on this issue is whether the method of providing notice to the defendant that his license is revoked or suspended comports with due process, since the defendant is being deprived of his right or privilege to drive and since the State need only present evidence that notice was mailed to the defendant in order to sustain a conviction. The Supreme Court has previously held with regard to notice that all that is constitutionally required is that the method of notice be reasonably calculated to reach the intended party. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed 865 (1949). That court went on to say that “the mails today are recognized as an efficient and inexpensive means of communication.”

The cases have held that the defendant is afforded constructive notice of his revocation which is sufficient since there is no requirement of actual notice in the criminal statutes, and that the mail, even ordinary mail as contrasted to certified or registered mail, is reasonably calculated to reach the defendant. *State v. Thomas*, supra, *State v. Baltromitis*, supra, *State v. Cattanach*, supra, *Hodges v. State*, supra, *State v. Pueschel*, supra.

Although [NRS 484.385](#)(3), 484.385(4), and 484.387(4) do not require notices to be sent by certified or registered mail, the Department has always sent such notices by certified mail. A driver under [NRS 483.390](#) is required to notify the Department within 10 days if he changes his address. Such a requirement ensures that mail sent to a driver is reasonably calculated to reach him. If he moves without leaving a forwarding address or without informing the Department of his new address, he should not be allowed to complain about lack of due process if he fails to receive a notice of revocation.

Even courts in jurisdictions that appear to require actual notice to the defendant prior to the suspension being effective have held that actual notice is not necessary where it can be shown that the individual voluntarily avoided being notified by such actions as refusing to claim a certified letter or moving and not leaving a forwarding address or notifying the state motor vehicle agency of his new address. *Ryan v. Andrews*, 361 N.E.2d 1086 (Ohio 1976), *City of Albuquerque v. Juarez*, 598 P.2d 650 (N.M. 1979).

In conclusion, Nevada’s statutory scheme for notifying an individual that his driver’s license is revoked and then punishing that individual for driving with a revoked license comports with due process. Since there is no requirement of willfulness or knowledge in [NRS 483.560](#) or 483.570, the intent of the driver is immaterial and not an element of the crime that need be proved by the State. There is therefore no need to prove that the defendant actually received notice of his revocation, and evidence that notice was mailed to the defendant is sufficient to sustain a conviction. There is no presumption to be rebutted by the defendant because the State need not prove receipt of the notice.

Therefore, with regard to the factual scenarios set out in Examples 1, 2, 3, and 4, all of those persons could properly be convicted of driving while revoked so long as the State could present evidence that notice of the revocation had been mailed to them at their last known address. There is no distinction between the persons in Examples 1 and 2 who have actual knowledge of their revocations and persons in Examples 3 and 4 who may or may not have actual knowledge of their revocations. Whether or not a defendant had actual knowledge of his revocation may be a factor a judge might want to consider in sentencing, but that fact has no bearing on whether or not the defendant is guilty of the crime charged.

CONCLUSION

Actual notice to the accused of the revocation of his driver’s license is not an element of the misdemeanor of driving while license revoked, since there is no requirement of willfulness or knowledge in the statutes which proscribe that offense ([NRS 483.560](#) and [483.570](#)). Evidence that notice was mailed to the accused pursuant to [NRS 484.385](#)(3) and 484.385(4) is sufficient to sustain a conviction of driving while license revoked.

Sincerely,

BRIAN MCKAY, *Attorney General*

By PATRICIA A. LYNCH, *Deputy Attorney General*

OPINION NO. 85-8 Campaign Practices; Candidates—Candidates for public office are required to file all three of the contribution and expense reports required by [NRS 294A.010\(1\)\(a\)-\(c\)](#) and [294A.020\(1\)\(a\)-\(c\)](#), respectively. This duty to file all three reports is not conditioned on the candidate’s success in the primary election.

CARSON CITY, June 21, 1985

THE HONORABLE MILLS LANE, *Washoe County District Attorney*, Washoe County Courthouse,
P.O. Box 11130, Reno, Nevada 89520

Attention: CASSANDRA D. CAMPBELL, *Deputy District Attorney*

DEAR MR. LANE:

You have requested our interpretation of two provision of the election campaign practices law, Chapter 294A of the Nevada Revised Statutes. Your specific request is concerned with the provisions of [NRS 294A.010](#) and [294A.020](#).

QUESTION

Do [NRS 294A.010](#) and [294A.020](#) require a candidate to file reports of contributions and expenditures for the period specified in subsections (1)(c) of each section thirty (30) days after the general election, for the period spanning the twenty (20) days immediately preceding the date of the general election, if in fact the candidate lost at the primary election?

ANALYSIS

Your office is considering the prosecution of two former candidates for public office who failed to file reports of their campaign contributions and expenses as required by the election campaign practices chapter. The two politicians were “candidates” required to file as defined in [NRS 294A.005](#) in that they filed declarations of candidacy with the Washoe County Registrar of Voters. [NRS 294A.031](#) requires that the reports referred to in [NRS 294A.010](#) and [294A.020](#) shall be filed even though the candidate has withdrawn his candidacy, received no campaign contributions or has no campaign expenses. [NRS 294A.010](#) and [294A.020](#) require a candidate to file reports of contributions and expenditures for the period specified in subsections (1)(c) of each statute. That time period prescribed in the subsections covers the period spanning the twenty (20) days immediately preceding the date of the general election. Reports of contributions and expenditures for this period must be filed no later than thirty (30) days after the general election.

Your office is uncertain if this particular reporting period is applicable to a candidate who loses at the primary election. Your uncertainty on this issue stems from the presence of certain language contained in subsections (1)(b) of [NRS 294A.010](#) and [294A.020](#). That language requires a candidate to file the statutorily prescribed reports “whether or not the candidate won

the primary election.” This language is absent from subsections (1)(c) of [NRS 294A.010](#) and [294A.020](#). Your concern is whether the difference in language between the two subsections in each section relieves a candidate from the obligation of filing the reports required for the third reporting period as prescribed in subsections (1)(c) of [NRS 294A.010](#) and [294A.020](#).

Your question presents an issue of statutory interpretation of [NRS 294A.010](#) and [294A.020](#) which has not been addressed by our State Supreme Court. However, the willful violation of [NRS 294A.010](#) and [294A.020](#) is punishable as a gross misdemeanor. Both statutes are penal in nature and must be strictly construed. *Sheriff v. Lugman*, [101 Nev. 149](#), 697 P.2d 107 (1985). However, strict construction does not require emasculation of the legislative purpose. *See Pease v. Taylor*, [88 Nev. 287](#), 296 P.2d 757 (1972).

When presented with a question of statutory interpretation, the intent of the Legislature is the controlling factor and, if the statute under consideration is clear on its face, a court cannot go beyond the statute in determining legislative intent. However, if the statute is ambiguous, it can be construed in line with what reason and public policy would indicate the Legislature intended. *Robert E. v. Justice Court*, [99 Nev. 443](#), 445, 664 P.2d 957 (1983). Our State Supreme Court has concluded that the provisions of the election campaign practices chapter serve the important informative and deterrent functions of insuring that the voters are fully informed and achieving, through publicity, the maximum deterrence to corruption and undue influence. *Arvey v. Sheriff*, [93 Nev. 468](#), 471, 567 P.2d 470 (1977).

The wording of [NRS 294A.010](#) and [294A.020](#) indicates that a candidate is under a mandatory duty to file all three reports specified in subparagraphs (a) to (c), inclusive, of subsection 1 of both sections. We can find no words which we believe condition in any way a candidate’s obligation to file the third report required by each statute upon that candidate’s success in the primary election. Our review of the regulations promulgated by the Secretary of State for the implementation and administration of the election campaign practices chapter does not disclose any rule which would relieve an unsuccessful primary election candidate from filing all thereof the contribution and expense reports required by [NRS 294A.010\(1\)\(a\)-\(c\)](#) and [294A.020\(1\)\(a\)-\(c\)](#), respectively. On the contrary, the form prescribed by the Secretary of State to be signed by all candidates as acknowledgment by them of receipt of the three reporting forms and the regulations of the secretary relating thereto declares, “I understand I must file the prescribed forms by the specified statutory date for each reporting period.” This administrative construction of the statute by the agency of government charged with its administration is entitled to considerable weight when such construction is intended to advance the purposes of the statute. *Oliver v. Spitz*, [76 Nev. 5](#), 10, 348 P.2d 158 (1960). Since candidates often receive additional contributions and make campaign expenditures after losing the primary election, requiring them to file the third report for the time immediately before the general election continues to advance the important informative and deterrent functions of these laws as noted by our supreme court in *Arvey v. Sheriff, supra*.

CONCLUSION

The provisions of [NRS 294A.010\(1\)\(c\)](#) and [294A.020\(1\)\(c\)](#) disclose that the wording of both places a mandatory duty on any candidate to file the third report of contributions and expenses thirty (30) days after the general election for the period spanning the twenty (20) days immediately preceding the date of the general election. This duty is not conditioned on the candidate’s success in the primary election. This interpretation fosters the disclosure of campaign contribution and expense information which ensures that the informative and deterrent functions of the election campaign practices chapter are effectuated.

Sincerely

BRIAN MCKAY, *Attorney General*

By SCOTT W. DOYLE, *Deputy Attorney General*

OPINION NO. 85-9 County Hospitals—A county hospital may not engage in business activities which are not expressly authorized by statute or strictly necessary to the operation of the hospital.

CARSON CITY, June 25, 1985

JAMES E. WILSON, JR. ESQ., *Elko County District Attorney*, Elko County Courthouse, Elko, Nevada 89801

DEAR MR. WILSON:

You have requested our opinion on whether Elko General Hospital can lawfully engage in certain private enterprise activities to generate additional revenue for the hospital. The specific question posed is as follows:

QUESTION

Do there exist any statutory prohibitions which prevent a county hospital from engaging in enterprises such as:

1. Offering commercial cleaning services through its housekeeping department;
2. Operating a dental lab for the manufacture of dental fixtures;
3. Providing in-home care to the elderly.

ANALYSIS

A county hospital created pursuant to [NRS Chapter 450](#) has no legal standing apart from the county. *King v. Baskin*, [89 Nev. 290](#), 291, 511 P.2d 115 (1973); *Hughey v. Washoe County*, [73 Nev. 22](#), 23, 306 P.2d 1115 (1957); *Bloom v. Southern Nevada Memorial Hospital*, [70 Nev. 533](#), 534, 275 P.2d 885 (1954); *Mckay v. Washoe General Hospital*, [55 Nev. 336](#), 340-41, 33 P.2d 755 (1934). Therefore, the powers of a county hospital must be evaluated under the same rules that apply to counties and other local governmental entities.

Counties are political subdivisions of the State, and as such, possess only those powers which the Legislature has expressly granted to them. *County of Pershing v. Sixth Judicial District Court*, [43 Nev. 78](#), 181 P. 960 (1914). The authority of a county is limited to the exercise of “only such powers . . . as are specially provided for by law.” *Hoyt v. Paysee*, [51 Nev. 114](#), 122, 269 P.2d 607 (1928).

It is well settled that county commissioners have only such powers as are *expressly granted* or as may be *necessarily incidental* for the purpose of carrying such powers into effect. (Emphasis added.)

State ex rel. King v. Lothrop, [55 Nev. 405](#), 408, 36 P.2d 355 (1934).

Therefore, the appropriate legal analysis is not whether the questioned activities are statutorily prohibited, but rather whether such activities are statutorily authorized.

A county hospital established pursuant to [NRS Chapter 450](#) is broadly authorized to “. . . be for the benefit of such county or counties and of any person falling sick or being injured or

maintained within its limits. . . .” [NRS 450.390](#)(1). The boards of trustees of such hospitals are authorized to develop rules and regulations governing the use of the hospital, the “admission” of charitable and non-charitable cases, and the payment of reasonable charges and fees therefor. [NRS 450.390](#)(3); [450.410](#)(1). The “. . . charges and fees shall include the *board and lodging* of the person and the *customary use of hospital facilities* by the person admitted.” (Emphasis added.) [NRS 450.410](#)(4). The statutory scheme of [NRS Chapter 450](#) grants both express and implied authority to a county hospital board of trustees to operate a hospital, as a hospital is customarily defined. [NRS 449.012](#) defines a “hospital” for licensing and regulatory purposes as follows:

“Hospital” means an establishment staffed and equipped to provide for diagnosis, care and treatment of all stages of human illness, and which provides 24-hour professional nursing service under the direction of physicians.

The language of the statutes cited above discuss the “admission” of patients, their “board and lodging,” and their “use of hospital facilities,” thus reinforcing the intent of the Legislature that customary hospital services be performed for patients on the hospital’s premises. How far a hospital may stray from that charge depends upon whether the proposed activities can be deemed “necessary” to the performance of these express powers.

[NRS 244.195](#) authorizes a board of county commissioners “. . . to do and perform all such other acts and things as may be lawful and strictly necessary to the full discharge of the powers and jurisdiction conferred on the board.” Such statutes do not significantly expand the authority of the board of county commissioners (or, analogously, a board of hospital trustees), since only incidental actions which are “strictly necessary” to those powers already clearly delegated are authorized. *First National Bank of San Francisco v. Nye County*, [38 Nev. 123](#), 139, 145 Pac. 932 (1914). As was stated in *Admiral Development Corp. v. City of Maitland*, 267 So.2d 860, 862 (Fla. 1972):

A power may not be implied as incidental to powers expressly granted merely because it is useful or convenient. It must be indispensable to the attainment of the declared objects and purposes of the corporation. The existence of power on the part of the municipality cannot be assumed; it must be made to appear, and if doubtful, the courts will not enforce it.

Accord, State ex rel. Fredericks v. Canavan, [17 Nev. 422](#) (1833).

It is clear then that the only incidental power a board possesses is that which is necessary to carry out the express powers granted. Attorney Generals Opinion No. 151 dated (3-3-1952). Whenever “. . . reasonable doubt should arise as to whether the municipality possesses a specific power, such doubt will be resolved against the city.” *Admiral Development Corp., supra.* at 867; *First National Bank, supra.*

In light of these applicable statutes and legal standards, an analysis of the specific activities questioned is appropriate. It is clearly beyond the jurisdiction of a county hospital to utilize the time, equipment, facilities, personnel or other assets of the hospital to operate a commercial cleaning business or to manufacture dental fixtures for sale to the public. Such activities are not expressly authorized, are not directly related to the operation of a public hospital, nor are they in any way “strictly necessary” to such operation. In short, such activities are purely “private enterprise” in nature and therefore outside the jurisdiction of the public hospital.

With respect to the proposal that the county hospital provide in-home nursing service to the elderly, such an activity is certainly more closely related than those previously discussed to the goals of healing the sick and infirm in the county. Nonetheless, it is difficult to legally justify an activity which, however admirable, is not “strictly necessary” to the operation or administration

of a hospital. This is reinforced by the health and care facility licensing provisions of [NRS Chapter 449](#) which distinguish a “home health agency” from a “hospital,” defining a home health facility as:

[A]n agency . . . which provides in the home, through its employees, skilled nursing

services and assistance and training in health and housekeeping skills.

[NRS 449.0095](#).

The Nevada Legislature has recognized that such home care services exist, but has clearly distinguished them from the usual, necessary and customary services provided by a hospital and has required separate identification and licensing of home care services. They are, therefore, neither incidental nor strictly necessary to the general operation of the hospital.

CONCLUSION

A county hospital established pursuant to [NRS Chapter 450](#) may not engage in any business enterprise unless such enterprise is expressly authorized by the statutes governing hospitals or unless it is strictly necessary to the routine and effective operation of the hospital. The operation of a commercial cleaning service, the manufacture and sale of dental fixtures, and the business of providing home care services to the elderly are activities outside the jurisdiction of the county hospital.

Very truly yours,

BRIAN MCKAY, *Attorney General*

By SUSAN L. JOHNSON, *Chief Deputy Attorney General*

OPINION NO. 85-10 Discrimination—Public Accommodations—Guide and hearing dogs are not prohibited from the premises of licensed cosmetological establishments by section 12 of S.B. 379.

CARSON CITY, September 9, 1985

MERVIN J. FLANDER, *Chief*, Bureau of Services to the Blind, Kinkead Building, 505 E. King Street, Carson City, Nevada 89710

DEAR MR. FLANDER:

You have requested an opinion from this office concerning the applicability of section 12 of S.B. 397 (1985 Nev. Stat., Ch. 536) to Chapter 651 of the Nevada Revised Statutes. The specific question posed is as follows:

QUESTION

Does section 12 of S.B. 397 (1985 Nev. Stat., Ch. 536) prohibit the use of guide or hearing dogs by visually or aurally handicapped persons on the premises of a licensed cosmetological establishment?

ANALYSIS

S.B. 397 provides in section 12:

It is unlawful for any animal to be on the premises of a licensed cosmetological establishment.

In apparent conflict with this provision is [NRS 651.075](#)(1), which states:

It is unlawful for a place of public accommodation to: (a) Refuse service to a visually or aurally handicapped person because he is accompanied by a guide dog or hearing dog. . . .

This section effects the beneficent objective of [NRS 651.070](#) which entitles all persons to full and equal enjoyment of the services of public accommodations without discrimination on the basis of physical or visual handicap.

It is clear initially that a licensed cosmetological establishment is a “place of public accommodation” as that term is defined by [NRS 651.050](#)(5), i.e., an establishment to which the public is invited. Thus, the narrow issue that must be resolved is whether the Legislature intended by section 12 of S.B. 397 to prohibit the use of guide or hearing dogs on the premises of a licensed cosmetological establishment?

The legislative history of S.B. 397 includes an exhibit introduced by the Nevada State Board of Cosmetology which contains a section-by-section analysis of this bill. This document states in reference to section 12:

This would allow our Inspectors the authority to control sanitary conditions by eliminating *pets* within the beauty salons (establishments). (Emphasis added.)

It is our understanding that section 12 was proposed to resolve complaints from customers of cosmetological establishments who objected to the presence of *pets* owned by the operators of the establishment.

We do not believe, nor can we find any evidence to support a conclusion, that the Legislature intended to singularly exempt licensed cosmetology establishments from the beneficent public policy objectives of [NRS 651.070](#).

We therefore conclude that section 12 of S.B. 397 (1985 Nev. Stat., Ch. 536) does not prohibit the use of guide or hearing dogs by visually or aurally handicapped persons on the premises of a licensed cosmetological establishment. However, since section 12 of S.B. 397 is a criminal statute, a cosmetological establishment may, pursuant to [NRS 651.075](#)(2), require proof that a dog is in fact a guide or hearing dog.

CONCLUSION

[NRS 651.075](#) is controlling over the provisions of section 12 of S.B. 397, thus permitting the presence and use of guide or hearing dogs on the premises of licensed cosmetological establishments. Such a conclusion effects the beneficent legislative intent of entitling all persons to the full and equal enjoyment of the goods and services of public accommodations without discrimination on the basis of physical or visual handicap.

Sincerely,

BRIAN MCKAY, *Attorney General*

By BRYAN M. NELSON, *Deputy Attorney General*

OPINION NO. 85-11 Constitutional Law: Public Officers/Peace Officers Use of Deadly

Force in Apprehending Felony Suspects—The United States Supreme Court in *Tennessee v. Garner* held that a police officer may use deadly force in apprehending a fleeing felony suspect only when an officer has probable cause to believe that the suspect poses a threat of serious physical harm to either the officer or to others. [NRS 200.140](#) and [NRS 171.122](#) are not unconstitutional as written but would be unconstitutional if applied contrary to the holding from *Tennessee v. Garner*.

CARSON CITY, August 20, 1985

WAYNE TEGLIA, *Director*, Department of Motor Vehicles, 555 Wright Way, Carson City, Nevada 89710

DEAR MR. TEGLIA:

You have requested the opinion of the Attorney General regarding the effect of the United States Supreme Court opinion in the case of *Tennessee v. Garner*, U.S., 105 S.Ct. 1694 (1985) on various provisions of Nevada statute. You have indicated that *Tennessee v. Garner* places restrictions on the use of deadly force by a police officer in the apprehension of a nondangerous fleeing felon and that [NRS 171.122](#), pertaining to the execution of arrest warrants, and [NRS 200.140](#), pertaining to justifiable homicide by a public officer, may be affected.

QUESTION

What is the effect of the United States Supreme Court opinion in *Tennessee v. Garner*, U.S., 105, S.Ct. 1694 (1985) on Nevada statutes allowing the use of deadly force by a public officer in the execution of said officer's duties.

ANALYSIS

A homicide by a public officer is deemed justified pursuant to the provisions of [NRS 200.140](#) as follows:

Homicide is justifiable when committed by a public officer, or person acting under his command and in his aid, in the following cases:

1. In obedience to the judgment of a competent court.
2. When necessary to overcome actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty.
3. When necessary:
 - (a) In retaking an escaped or rescued prisoner who has been committed, arrested for, or convicted of a felony;
 - (b) In arresting a person who has committed a felony and is fleeing from justice;
 - (c) In attempting, by lawful ways or means, to apprehend a person for a felony actually committed; or
 - (d) In lawfully suppressing a riot or preserving the peace.

The above-quoted provision of the Nevada Revised Statutes, regarding justifiable homicide by a public officer, is expanded to some extent by the provisions of [NRS 200.150](#), which provide as follows:

All other instances which stand upon the same footing of reason and justice as those enumerated shall be considered justifiable or excusable homicide.

The term public officer as used in Nevada's justifiable homicide statute is defined in [NRS](#)

[169.164](#) as:

“Public officer” means a person elected or appointed to a position which:

1. Is established by the constitution or a statute of this state, or by a charter or ordinance of a political subdivision of this state; and
2. Involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty.

Our research of Nevada law has revealed no cases which discuss justifiable homicide by a public officer under these provisions. These statutes by their own terms categorize the killing of a human being as justifiable when such killing is committed by a public officer or person acting under his command and in his aid if such force is necessary to overcome actual resistance to the performance of the officer or person’s legal duty and/or legal process. Furthermore, [NRS 200.140](#) defines justifiable homicide to include the killing of a human being when it is necessary in the retaking of an escaped or rescued felon or a person arrested for a felony. In addition, a homicide is considered justifiable when committed by a public officer in the course of arresting a person who has committed a felony and who is fleeing from justice or resisting arrest. Pursuant to [NRS 200.150](#) all other circumstances which would be similar to those enumerated would also be considered justifiable or excusable homicide.

Nevada statute also provides for the use of force to execute an arrest warrant under the provisions of [NRS 171.122](#). It is provided in [NRS 171.122](#) in pertinent part as follows:

1. The warrant must be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he must show the warrant to the defendant as soon as possible. If the officer does not have a warrant in his possession at the time of the arrest, he shall then inform the defendant of his intention to arrest him, of the offense charged, the authority to make it and of the fact that a warrant has or has not been issued. The defendant must not be subjected to anymore restraint than is necessary for his arrest and detention, *but if the defendant either flees or forcibly resists, the officer may use all necessary means to effect the arrest. . . .* (Emphasis added.)

The provisions of [NRS 171.122](#), quoted hereinabove, refer to peace officers. See [NRS 171.104](#) “Peace officer” is defined under the provisions of [NRS 169.125](#). This statute contains a list of public officers who are considered peace officers for specified purposes.

In the course of researching this question, other provisions in Nevada statutes were found which allow the use of force in carrying out specific public duties by public officers and/or peace officers. The use of deadly force is not excluded in these statutes. For example, under [NRS 179.055](#) an officer may use, “all reasonable and necessary force” to effect an entry into a building in order to execute a search warrant. Interestingly, [NRS 199.450](#) makes it a gross misdemeanor for a peace officer, while executing a search warrant, willfully to exceed his authority or to exercise it with unnecessary severity. Another statute which apparently authorizes the use of force under specified circumstances is found at [NRS 193.260](#) (persons acting by command by officers of justice).

The case of *Tennessee v. Garner*, which you have brought to our attention, was decided by the United States Supreme Court on March 27, 1985. In that case, the father of a fifteen-year-old boy, who was shot and killed by a police officer while fleeing from the burglary of an unoccupied house, brought a wrongful death action under the Federal Civil Rights Act, 42 U.S.C. § 1983, against the police officer who fired the shot, the police department, as well as others. In this case, the United States District Court entered judgments for all defendants after a three day bench trial. The District court held that the officer’s actions were authorized under a Tennessee statute

which provided that “[i]f, after notice of the intention to arrest the defendant, he either flee[s] or forcibly resist[s], the officer may use all necessary means to effect the arrest.” Tenn. Code Ann. § 40-7-108 (1982). Cf. [NRS 171.122](#). The policy of the police department in question was somewhat more restrictive than this statute, but it still allowed the use of deadly force in cases of burglary.

The Sixth Circuit Court of Appeals eventually reversed and remanded this district court decision. The Court of Appeals held that:

... the killing of a fleeing suspect is a “seizure” under the Fourth Amendment, and is therefore constitutional only if “reasonable.” The Tennessee statute failed as applied to this case because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes—“the facts, as found, did not justify the use of deadly force under the Fourth Amendment.” *Id.*, at 246. Officers cannot resort to deadly force unless they “have probable cause . . . to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community if left at large.” *Ibid.* (Footnotes omitted.)

Id., at 1698-1699. The State of Tennessee appealed to the United States Supreme Court and the City of Memphis filed a petition for writ of certiorari. The Supreme Court noted probable jurisdiction in the appeal and granted the petition.

The United States Supreme Court conducted a lengthy analysis of its previous decisions regarding seizures by police officers and the use of deadly force by such officers. In the course of this analysis, the court made specific reference to Nevada’s justifiable homicide by public officer law, as codified in [NRS 200.140](#) (1983). *Id.*, at 1704, fn 14. The court pointed out that Nevada’s law is the statutory embodiment of the common law rule which allows the use of whatever force is necessary to effect the arrest of a fleeing felon, although not that of a fleeing misdemeanor. *Id.*, 1703-1704.

The United States Supreme Court also noted a trend in the policies of police departments across the country which is more restrictive than the common law rule. The police departments in a majority of large cities in the United States do not allow the firing of a weapon unless a felon presents a threat of death or serious bodily harm.

The United States Supreme Court concluded in *Tennessee v. Garner* that the Court of Appeals correctly held that an officer cannot resort to deadly force unless he has probable cause to believe that a felony has been committed and that the person committing it poses a threat to the safety of the officer or a danger to the community. *Id.* at 1699. The Supreme Court noted that in every case where deadly force is used one must weigh the potential finality of the use of such deadly force against the governmental interest in effective law enforcement, saying:

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of non-violent suspects. Cf. *Delaware v. Prouse*, *supra*, 440 U.S., at 659, 99 S.Ct. at 1399. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. See *infra*, at 1704-1705. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. See *Schumann*

v. McGinn, 307 Minn. 446, 472, 240 N.W.2d 525, 540 (1976) (Rogosheske, J., dissenting in part). Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life. (Footnotes omitted.)

Id., at 1700-1701.

The very next paragraphs of the opinion in *Tennessee v. Garner* best express the opinion of the court that deadly force may not always be used to prevent the escape of a felony suspect:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspect.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.

Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster. (Emphasis added.)

Id., at 1701.

Nevada's statute regarding justifiable homicide by a public officer, [NRS 200.140](#), appears to authorize the apprehension by use of force of a person who has committed a felony without regard to the dangerousness of that suspect. Furthermore, [NRS 171.122](#) authorizes the use of "all necessary means to effect the arrest." This necessarily implies that the peace officer may use any necessary amount of force to arrest a suspect when that suspect is in the act of fleeing. These statutes are similar to that provision of the Tennessee Code Annotated which was considered by the United States Supreme Court in *Tennessee v. Garner*. The Supreme Court found the Tennessee statute was only unconstitutional *as applied* to the facts in the *Garner* case. *Id.* 1701, 1707. There is no doubt that under a fact situation similar to that of *Tennessee v. Garner* the United States Supreme Court would find the above-referenced Nevada statutes unconstitutional as applied.

Like the Tennessee statute, these Nevada statutes should not be considered unconstitutional for all purposes. Rather, they may be considered unconstitutional as applied to fact situations like that in *Tennessee v. Garner*. Thus, the holding in *Tennessee v. Garner* must be viewed by all Nevada law enforcement officials as a restriction on their ability to use deadly force in apprehending a felony suspect. Specifically, each law enforcement agency in this State which has not already done so should adopt an official policy under the precedent of *Tennessee v. Garner* to the effect that deadly force may only be used to prevent the escape of, or to apprehend, a felony suspect where the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others. All provisions of Nevada law allowing the use of force by public officers in apprehending felony suspects must be similarly tempered by this constitutional mandate.

CONCLUSION

The United States Supreme Court in *Tennessee v. Garner* held that a police officer may only use deadly force in apprehending a fleeing felony suspect when an officer has probable cause to believe that the suspect poses a threat of serious physical harm to either the officer or to others. [NRS 200.140](#) (justifiable homicide by public officer) and [NRS 171.122](#) (manner in which execution of warrant and service of summons are made) are not unconstitutional as written, but would be considered unconstitutional if applied contrary to the above-quoted holding from *Tennessee v. Garner*. This constitutional mandate regarding the appropriate use of deadly force by officers should be adopted as the official policy of each law enforcement agency in the State of Nevada.

Very truly yours,

BRIAN MCKAY, *Attorney General*

By BROOKE A. NIELSEN, *Chief Deputy Attorney General*

OPINION NO. 85-12 Investments of Money by Local Governments—1985 Nev. Stat. Ch. 646 requires a city to take physical or constructive possession of investment securities purchased; although not statutorily mandated that a city secure deposits by collateral, prudent financial practice dictates that public funds be protected in some reasonable manner. (See [NRS 356.020](#).)

CARSON CITY, August 26, 1985

THE HONORABLE ROBERT L. VAN WAGONER, *Reno City Attorney*, City Hall, P.O. Box 1900,
Reno Nevada 89505

DEAR MR. VAN WAGONER:

You have requested an opinion from this office interpreting Chapter 646 of the 1985 Statutes of Nevada pertaining to investments of money by local governments. One of the questions you have posed is as follows:

QUESTION ONE

Must a city, which elects to make its own investments in lieu of participating in any state or county arrangement for the pooling and investment of public funds, take physical or constructive possession of the investment securities?

ANALYSIS

1985 Nev. Stat., Ch. 646 § 3, hereinafter referred to as “Section 3,” states:

1. Any securities purchased as an investment of money by or on behalf of a local government, as defined in [NRS 354.474](#), must remain in the possession of the treasurer or other appropriate officer of that local government or a bank, as provided in subsection 2, throughout the period of the investment, except that any securities subject to repurchase by the seller may be evidenced by a fully perfected, first-priority security interest, as

provided in subsection 3.

2. The treasurer or other appropriate officer of a local government may physically possess such securities, which must be in bearer form or registered in the name of the local government, or make an agreement, in writing, with the trust department of any bank insured by the Federal Deposit Insurance Corporation to hold those securities in trust for that local government. If such an agreement is made, the trust department shall furnish the treasurer or other officer with a written statement acknowledging that it is so holding the securities.

3. If the securities purchased are subject to an arrangement for the repurchase of those securities by the seller thereof, the treasurer or other officer or a trust department of a bank, as provided in subsection 2, may, in lieu of the requirement of possession, obtain the sole, fully perfected, first-priority security interest in those securities. If the trust department of a bank obtains such a security interest, it shall furnish the treasurer or other officer with a written statement acknowledging that fact. Any securities so purchased must, at the time of purchase by or for a local government, have a fair market value equal to or greater than the repurchase price of the securities.

Since the City of Reno is an entity which has the right to receive money from taxes, it falls within the definition of local government as set forth in [NRS 354.474](#), i.e., cities, counties, towns, school districts, improvement districts, etc.

You agree that Section 3, standing alone, requires that local governments take possession of securities purchased either through the appropriate officer of the local government or through a bank. However, you assert that Section 3 should be read in conjunction with 1985 Nev. Stat., ch. 646 §§ 2 and 4, hereinafter referred to as “Section 2” and “Section 4,” to arrive at the conclusion that only in cases where a local government chooses to pool money with the county treasurer is the local government required to take physical or constructive possession of the purchased securities.

It is our opinion, however, that Section 3 applies to all investments of money by local governments, whether the investment is made on behalf of a local government by the state or county treasurer in a pooling arrangement or is made separately by a local government on its own behalf. This opinion is based upon the express language of the statute, applicable rules of statutory construction, and the legislative intent in enacting 1985 Nev. Stat. Ch. 646, as set forth in the legislative history.

The express language of Section 3 requires that the treasurer or other appropriate officer of a local government or a bank must take possession of “[a]ny securities purchased as an investment of money by or on behalf of a local government.” Within the context of Section 3, no internal reference is made to Sections 2 and 4. The language used in Section 3 plainly and unambiguously requires possession of securities purchased by or for a local government; therefore, the statutory meaning must be deduced solely from this language, and we have no right to go beyond the face of the statute. *Cirac v. Lander County*, [95 Nev. 723](#), 729, 602 P.2d 1012, 1015 (1979); *Demosthenes v. Williams*, [97 Nev. 611](#), 614, 637 P.2d 1203 (1981).

Assuming, *arguendo*, that there exists a doubt as to the meaning of the words used in Section 3, it would be our duty to consider the object, extent and scope of the statute in order to ascertain the legislative intent, which would then control. *Seaborn v. District Court*, [55 Nev. 206](#), 219, 29 P.2d 500 (1934). The object of the act is expressed in the title to Chapter 646 of the 1985 Statutes of Nevada:

AN ACT relating to public investments; authorizing a county treasurer to pool the money of local governments for investment; *requiring possession of or a security interest in securities purchased by a local government*; authorizing a county to take action to recover money invested under certain circumstances; and providing other matters

properly relat[ed] thereto. (Emphasis added.)

In construing an ambiguous statute, evidence of the Legislature's intent may be gleaned from the title of the act by which the statute was enacted. *Thompson v. District Court*, [100 Nev. 352](#), 683 P.2d 17 (1984). The title to the act sets forth three distinct purposes which are related only because of the fact that each pertains to public investments. Neither in the title to the act, nor in the express language of the act, is the duty of local government to take possession of securities limited to instances where investments are pooled by the county.

In determining the intent of the statute, we must review the amendments to an act within the context of the act as a whole. *Nevada Tax Comm'n v. Bernhard*, [100 Nev. 348](#), 683 P.2d 21 (1984). Chapter 646 of the 1985 Statutes of Nevada amends Chapter 355 of the Nevada Revised Statutes by adding Sections 2, 3 and 4 as well as amending [NRS 355.170](#). Chapter 355 of Nevada Revised Statutes is entitled "Public Investments." The amendments cited above will be reflected in a portion of Public Investments Act entitled "Investments by Local Governments."

Prior to the enactment of Chapter 646 of the 1985 Statutes of Nevada, local governments were allowed to pool investments through a trust fund administered by the State Treasurer pursuant to [NRS 355.167](#), or make their own investments by purchasing the securities authorized in [NRS. 355.170](#). Effective July 1, 1985, Section 2 provides local governments with an alternative pooling arrangement. Counties now have the ability to pool money held by the county treasurer on behalf of local governments. Section 2 pertains only to the county and its duties when it undertakes to pool money for the purposes of investment. Note the express language used by the Legislature in Section 2. Both terms, "county" and "local government," which by definition includes a county, appear in setting forth the duties of the county.

Section 4 gives the county the authority under certain circumstances to recover money invested by the county treasurer when a separate or a pooled investment has been made of either county money or local government money. Section 4 deals not just with pooled investments but separate investments; although the investment must be made by the county treasurer before the county's authority arises to recover money invested. The Legislature used the following language in Section 4(1):

If an investment of the *money of a county or other local government* is made by the county treasurer, whether separate or through a pooling arrangement as provided in section 2 of this act, *the county may, on behalf of that local government*, take any lawful action necessary to recover the money invested. . . . (Emphasis added.)

It is noted again that, as in Section 2, the Legislature distinguishes between counties and local governments in the express language of Section 4.

In Section 3, which is at issue here, the Legislature did not use the term "county" as it chose to do with Sections 2 and 4. The Legislature could have limited the scope of Section 3 to investments purchased by the county as it did in Sections 2 and 4, but it did not. To read Section 3 to pertain only to county pooled funds is to read it too narrowly. The term "treasurer" is not qualified in Section 3. Note in Sections 2 and 4 the treasurer is the "county treasurer." In order to interpret Section 3 as you suggest, one would have to add the following language which appears in italics below:

Any securities purchased as an investment of money by *the county treasurer on behalf of the county* or on behalf of a local government, as defined in [NRS 354.474](#), must remain in possession of *the county treasurer*. . . .

The term "county" was expressly omitted in Section 3, whereas it was expressly used in Sections 2 and 4. We must presume that the omission of the restrictive language was intentional and

deliberate, especially in light of the legislative history preceding the enactment of Section 3.

The legislative history reveals the inclusion of Section 3 in Ch. 646 of 1985 Statutes of Nevada was promoted by the failure of a company known as ESM resulting in the loss of millions of dollars of Clark County's investments with that company. ESM had pledged securities to Clark County securing the county's investments; however, ESM retained possession of those securities, and pledged the same securities to other parties. During testimony before the Senate Committee on Government Affairs, the committee was advised that the purpose of the act was two-fold: to establish a procedure for the pooling of funds for investment purposes by a county treasurer, and to tighten up security for investments. Senate Committee on Government Affairs, Committee Minutes, May 22, 1985, hereinafter referred to as "Minutes," p. 3. The committee was advised that taking possession of securities would be costly to local governments. Minutes, p. 3.

Apparently, the Legislature, by enacting Section 3, considered the short-term cost to local governments to be outweighed by the risk of loss of large sums of public funds if a physical or constructive possession of the securities was not maintained. To construe Section 3 to not apply to a city when the language is unambiguous and the intention of the Legislature is clearly to provide protection for public investments, following a substantial loss by Clark County, would effectively nullify the statute's manifest purpose. See *Woofter v. O'Connell*, [91 Nev. 756](#), 762, 542 P.2d 1396 (1975).

CONCLUSION

Section 3 of Ch. 646, 1985 Nev. Stat., is designed to protect public investments. It mandates that a local government must take possession of securities purchased by or on its behalf. Whether the securities were purchased separately or through a pooling arrangement by the state Treasurer, the county treasurer, or separately by an officer of a local government, possession of the securities must be maintained by the State Treasurer, county treasurer, city treasurer or other appropriate officer of that local government or a trust department of any bank insured by the Federal Deposit Insurance Corporation. In lieu of the requirement of possession of securities, a "sole, fully perfected, first-priority security interest in those securities" may be obtained, if the securities purchased are subject to a repurchase agreement with the seller of the securities.

You also requested an opinion regarding the following:

QUESTION TWO

Must a city secure deposits by collateral as required by [NRS 356.020](#), as amended by 1985 Nev. Stat., Ch. 646, § 5.5?

ANALYSIS

[NRS 356.020](#)(1) requires that "all money deposited by the state treasurer which is not within the limits of insurance provided by an instrumentality of the United States must be secured by collateral. . . ." 1985 Nev. Stat., Ch. 646, § 5.5 amends [NRS 356.020](#) to prohibit financial institutions from pooling securities to secure money deposited by the State Treasurer.

[NRS 356.125](#) provides that it is within the discretion of the counties to contract with a depository to secure deposits in time accounts "by the same types of collateral and in the same manner as allowed for securing deposits of the state treasurer under [NRS 356.020](#) and [356.025](#)." No such provision appears in the Nevada Revised Statutes regarding cities, whether incorporated under general law or chartered. Although it is not statutorily mandated that cities secure deposits with collateral comporting with the requirements of [NRS 356.020](#), in our opinion prudent financial practice dictates that public funds be secured. One method of providing such security is

to require that collateral be held as security for deposits which are not fully insured.

Since we have concluded that [NRS 356.020](#), as amended by Section 5.5, is not applicable to the City of Reno, we need not address your question regarding whether application of the statute impairs existing contracts between the City of Reno and financial institutions. However, we do suggest that if those existing contracts contain a clause providing for modification, negotiations should be commenced to modify the contracts to include a provision requiring that collateral be pledged to secure deposits of amounts greater than the limits of insurance.

CONCLUSION

It is not statutorily mandated that a city secure deposits by collateral as is required of the State Treasurer pursuant to [NRS 356.020](#). However, prudent financial practice dictates that public funds be protected in some reasonable manner.

Sincerely,

BRIAN MCKAY, *Attorney General*

By JENNIFER STERN, *Deputy Attorney General*

OPINION NO. 85-13 Fish and Fisheries: Legality and Regulation of Fishing Tournaments—Nevada law does not prohibit fishing contests provided organizers and participants comply with all legal requirements governing fishing and watercraft. Department of Wildlife may furnish hatchery fish for such contests on public waters provided contest is general in character and benefits public. board of Wildlife Commissioners may adopt regulations governing fishing contests. Attorney General's Opinion No. 411 (Oct. 2, 1958) overruled.

CARSON CITY, September 10, 1985

WILLIAM A. MOLINI, *Director*, Nevada Department of Wildlife, 1100 Valley Road, Post Office Box 10678, Reno, Nevada 89520

DEAR MR. MOLINI:

This letter is in response to your request for an opinion of the Attorney General relative to the legality and regulation of fishing contests or tournaments within the State of Nevada. Your inquiry on this subject contains three separate questions regarding fishing contests. Each of these specific issues will be addressed separately in this opinion.

QUESTION ONE

Whether Nevada law prohibits persons, corporations or other associations from conducting a fishing contest or tournament within the territorial jurisdiction of the State of Nevada.

ANALYSIS

A review of applicable state statutes discloses that the subject of fishing contests or tournaments is not expressly addressed by Nevada law. See [NRS 501.010](#)-504.390 (1979-1983). A similar review of the statutes in the ten western states of Arizona, California, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming discloses that only four of the

jurisdictions apparently have enacted statutes governing such contests. *See* Cal. Fish & Game Code § 2003 (West Supp. 1985); Mont. Code Ann. § 87-3-121 (1983); Or. Rev. Stat. §§ 498.202 & 498.279 (1981); Wash. Rev. Code Ann. §§ 77.16.010 & 77.32.310 (West Supp. 1985).

None of these statutory schemes totally prohibits fishing contests. By contrast, the laws in other jurisdictions promulgate certain parameters for fishing tournaments. Among these statutory provisions are limitations upon monetary value of any prize. *See* Cal. Fish & Game Code § 2003(c) (West Supp. 1985); Or. Rev. Stat. §§ 498.202 & 498.279(1)(a)-(b) (1981). Also included in some state statutes are restrictions upon the species of fish which may be the subject of a contest. *See* Cal. Fish & Game Code § 2003(a) (West Supp. 1985); Or. Rev. Stat. § 498.279 (1981). Some statutory schemes contain requirements for a special permit from and the payment of fees to the responsible state wildlife agency. *See* Cal. Fish & Game Code § 2003(a)-(b) (West Supp. 1985); Wash. Rev. Code Ann. §§ 77.16.010 & 77.32.310 (West Supp. 1985). All of these state laws place restrictions upon the time, place and manner in which the fishing tournament may be conducted. *See* Cal. Fish & Game Code § 2003(a)-(c) (West Supp. 1985); Mont. Code Ann. § 87-3-121 (1983); Or. Rev. Stat. §§ 498.202 & 498.279 (1981); Wash. Rev. Code Ann. § 77.16.010 & 77.32.310 (West Supp. 1985).

In the absence of express legislative limitations similar to the statutory schemes existing in the states of California, Montana, Oregon and Washington, fishing contests or tournaments are legally permissible under Nevada law. The organizations conducting these contests and the individual sportsmen participating in these tournaments, however, must comply with the statutes and regulations governing fishing upon the public waters within this State. Consequently, the participants in a fishing tournament must be properly licensed, *see* [NRS 502.010-502.290](#) (1983); [NAC 502.001-502.410](#) (1984), and the tournament organizers and participants must comply with state law governing matters such as open seasons, special tag requirements and daily creel and possession limits. *See* [NRS 503.005-503.050](#) and [503.270-503.430](#) (1983); [NAC 503.010-503.140](#) and [503.500-503.593](#) (1984). Similarly, the organizers and participants in a fishing tournament must adhere to the mandates of Nevada law governing “marine . . . tournaments on any waters of this state.” [NRS 488.305](#) (1983); [NAC 488.500](#) (1984), as well as the general provisions of state statute and regulation governing watercraft. *See* [NRS 488.015-488.365](#) (1983); [NAC 488.010-488.575](#) (1984).

CONCLUSION

Unlike certain neighboring jurisdictions, Nevada has no statutory limitations on fishing contests or tournaments conducted upon the waters within the territorial jurisdiction of this State. Accordingly, Nevada law does not prohibit fishing tournaments in this State provided the organizers of and participants in these contests comply with all of the statutory and regulatory requirements governing fishing and watercraft within the State of Nevada.

QUESTION TWO

Whether Nevada law prohibits the Nevada Department of Wildlife from supplying hatchery fish raised with public funds for use in a fishing contest or tournament conducted upon public or private waters within this State or where participants in the fishing contest are limited to a certain group or organization.

ANALYSIS

Nevada law provides in relevant part that:

Wildlife in this state not domesticated and in its natural habitat is part of the

natural resources belonging to the people of the State of Nevada.

...
It is unlawful for any person to sell, or expose for sale, to barter, trade or purchase, or attempt to sell, barter, trade or purchase any species of game fish, . . . except as provided in this Title.

[NRS 501.100](#)(1) & [501.381](#)(1) (1983).

A fundamental principle of law is that public funds may not be expended for private purposes. *See, e.g., Wood v. Budge*, 374 P.2d 516, 518-519 (Utah 1962); *State ex rel. Collier v. Yelle*, 115 P.2d 373, 377 (Wash. 1941); *State ex rel. Warrren [Warren] v. Nusbaum*, 208 N.W.2d 780, 795-799 (Wisc. 1973). When state government uses public money there must be a direct and not merely incidental advantage to the public. *See, e.g., Opinion of the Justices*, 208 N.E.2d 823, 826-827 (Mass. 1965); *Pach v. Southern Bell Tel. & Tel. Co.*, 387 S.W.2d 789, 794-796 (Tenn. 1965); *Johnson v. Johnson*, 634 P.2d 877, 879 (Wash. 1981); *State ex rel. Warren v. Nusbaum*, 208 N.W.2d 780, 795-799 (Wisc. 1973). The expenditure of public financial resources, however, may benefit a particular class of citizens more immediately, provided the funds are used for a project reasonably general in character and which benefits a significant part of the public. *See, e.g., Idaho Water Resources Bd. v. Kramer*, 548 P.2d 35, 59 (Idaho 1976); *Pach v. Southern Bell Tel. & Tel. Co.*, 387 S.W.2d 789, 794-796 (Tenn. 1965); *Sado v. City of Spokane*, 588 P.2d 1231, 1233 (Wash.App. 1979); *State ex rel. Warren v. Nusbaum*, 208 N.W.2d 780, 795-799 (Wisc. 1973); *Clifford v. City of Cheyenne*, 487 P.2d 1325, 1328-1329 (Wyo. 1971). This proposition of law is the recognized public policy of the State of Nevada. *See Nev. Const. art. 4, § 19*; Nev. [Const. Art. 8, § 9](#); [NRS 353.255](#) (1983); Attorney General's Opinion No. 197 (Jan. 11, 1936).

Considering the legal principles discussed above, the Nevada Department of Wildlife may not legally supply hatchery fish raised with public funds for use in a fishing tournament on private property or whose participants are so limited as to only incidentally or insignificantly benefit the public. Private associations or clubs likewise may not receive hatchery fish for tournaments conducted only for their membership or Guests.

By contrast, the department may provide hatchery fish for such tournaments where these contests are conducted on public waters and the contests are open to public participation. Similarly, under the public purpose doctrine, the department may supply hatchery fish where the fishing tournament is reasonably general in character and benefits a significant part of the public. Accordingly, fishing tournaments for certain classes of the public, such as children, the elderly or the underprivileged, may be the beneficiaries of hatchery fish.

The conclusion of the Attorney General concerning the application of the public purpose doctrine to supplying hatchery fish for fishing tournaments is based upon two important concepts. First, the public purpose doctrine must be broadly construed to comport with the changing conditions of modern life. *See, e.g., People ex rel. City of Salem v. McMackin*, 291 N.E.2d 807, 812 (Ill. 1972); *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331, 337 (Minn. 1978); *Stanley v. Department of Conservation & Dev.*, 199 S.E.2d 641, 657 (N.C. 1973); *Opinion to the Governor*, 308 A.2d 809, 811 (R.I. 1973). Second, under the public purpose doctrine, a particular government allocation of resources is not invalid solely because a private entity or group is benefited alone, provided there is a public purpose. *See, e.g., J.S. Nichols Co. v. City of Kansas City*, 639 S.W.2d 886, 893 (Mo.App. 1982) (private lease of property for neighborhood preservation project); *Dover Veterans Council, Inc., v. City of Dover*, 407 A.2d 1195, 1196 (N.H. 1979) (expenditure of public funds for veterans meeting hall); *Uhls v. State ex rel. City of Cheyenne*, 429 P.2d 74, 87 (Wyo. 1967) (financing private corporation plant with public funds to provide employment).

Liberally applying the public purpose doctrine to the present issue convinces the Attorney General that hatchery fish may be supplied for fishing contests under the circumstances discussed

above. Unquestionably, fishing contests are constructive outdoor activities which emphasize the special attributes of the natural resources of Nevada. The public is surely benefited by such activities which encourage our youth, senior citizens or disadvantaged to participate in an attribute of the natural heritage of Nevada. Like the expenditure of public funds for urban renewal or employment generation, use of public resources to encourage the use and enjoyment of the State's wildlife in our urbanized society is appropriate.

This office concludes that the public purpose doctrine supports this result despite an earlier opinion of the Attorney General to the contrary. *See* Attorney General's Opinion No. 411 (Oct. 2, 1958). That opinion cursorily discussed the question and resolved this issue without addressing the public purpose doctrine whatsoever. To the extent that the 1958 opinion is inconsistent with the present conclusions of the Attorney General, that opinion is overruled.

In applying this rule, however, the department should be careful to supply hatchery fish to certain groups only when this action is consistent with the public ownership of the resource, *see* [NRS 501.100](#) (1) (1983), and where providing these fish will not violate the statutory prohibition on the sale, trade or barter of game fish. *See* [NRS 501.381](#)(1) (1983).

CONCLUSION

The public purpose doctrine declares as a matter of public policy that the public funds of the State of Nevada may not be expended for private benefit. Consistent with this policy, the Nevada Department of Wildlife may supply hatchery fish for fishing tournaments conducted on public waters provided the participants of such a contest are not limited to private clubs, associations or another class of persons which prevents the expenditure of this government resource from benefiting a significant part of the public.

QUESTION THREE

Whether Nevada law authorizes the Nevada Board of Wildlife Commissioners to promulgate regulations governing fishing tournaments, including the imposition of permit and bonding fees.

ANALYSIS

The Nevada Legislature has directed the Board of Wildlife Commissioners to "establish policies and adopt regulations necessary to the preservation, protection, management and restoration of wildlife and its habitat" which has been recognized to "contribute immeasurably to the aesthetic, recreational and economic aspects of these natural resources." [NRS 501.100](#)(2) and 501.105 (1983). *See* [NRS 501.181](#) (1983). Similarly, the commission is responsible for establishing policies and promulgating regulations to promote "the safety of persons using or property used in the operation of vessels on the waters of the state." [NRS 501.181](#)(1)(b) (1983).

Nevada's Legislature has also instructed the commission to "use its authority to manage land to carry out a program for conserving, protecting, restoring and propagating selected species of native fish . . . and their habitats which are threatened with . . . destruction." [NRS 503.587](#) (1983). Section 503.050 of the Nevada Revised Statutes declares that "It is unlawful for any person to cause through carelessness, neglect or otherwise any edible portion of any . . . game fish . . . to go to waste needlessly." [NRS 503.050](#)(1) (1983).

Considering the expansive powers and responsibilities delegated to the commission by statute, the Attorney General concludes that the Nevada Board of Wildlife Commissioners is legally authorized to adopt reasonable regulations governing fishing contests on public waters in this State in order to preserve, protect and manage Nevada fisheries. Likewise, the commission is empowered to promulgate reasonable regulations to promote watercraft safety related to fishing tournaments. These regulations, however, may not include any permitting requirements,

fee payment or bonding prerequisites because the Nevada statutes do not authorize specifically or by necessary implication such regulations. *See* N.J. Singer, *Sutherland Statutory Construction* § 31.02 at 521-522 (4th rev. ed. 1985). By comparison, reasonable regulations of fishing tournaments might include a particular form of a use agreement for the sponsor of such contests which contains specific provisions which will assist the commission in preserving and managing the affected fishery, as well as promote watercraft safety related to fishing tournaments. *Cf.* [NRS 501.337\(7\)](#) (1983) (statutory obligation of director to administer real property assigned to the department); [NRS 501.351](#) (1983) (power of director to enter agreements to effect policies of commission); [NAC 504.155](#) (1984) (power of department to deny use of management area where abused).

CONCLUSION

Nevada law empowers the Board of Wildlife Commissioners to adopt regulations necessary to preserve, protect and manage wildlife, wildlife habitats and to promote watercraft safety on public waters. State statute likewise prohibits and [any] waste of game fish. These powers, legislatively delegated to the commission, would support the promulgation of reasonable regulations governing the conduct of fishing tournaments on public waters within this State. Although these regulations may not include bonding or permit fee requirements, prerequisites for fishing tournaments may be imposed by a regulatory scheme utilizing the contractual powers of the Nevada Department of Wildlife.

Sincerely,

BRIAN MCKAY, *Attorney General*

By DAN R. REASER, *Deputy Attorney General,*
Civil Division

**OPINION NO. 85-14 Notaries Public—1985 Nev. Stat. Ch. 426, §§ 4(2) and 5(1)
Interpreted—Disqualification of notaries public who have interest in underlying
transaction.**

CARSON CITY, August 30, 1985

THE HONORABLE WILLIAM D. SWACKHAMER, *Secretary of State*, Capitol Building, Carson City,
Nevada 89710

DEAR MR. SWACKHAMER:

You recently requested an interpretation of 1985 Nev. Stat., Ch. 426, pertaining to the acts and powers of notaries public. In addition, members of the legal profession, real estate licensees and employees of financial institutions and escrow companies have expressed concern about their ability under the law to perform notarial acts in connection with their normal business activities. Because of its impact on these occupations, this opinion will address all of these concerns.

BACKGROUND

The practice of law, the sale of real estate and, to a lesser extent, the provision of financial and escrow services often involve influencing persons to enter into transactions which require the

performance of notarial acts. For example, an attorney may recommend that his client prepare an affidavit for use in pending litigation. A real estate agent may recommend that his principal accept an offer for the sale of his residence which will require the execution of a deed. A loan officer may recommend financing which will require the execution of a mortgage. Very often, persons engaged in these occupations, as well as their associates, partners and employees, are also authorized to perform notarial services.

ANALYSIS

A notary public is generally defined as an officer whose duty is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained. *State ex rel. Pickett v. Truman*, 64 S.W.2d 105 (Mo. 1933). In Nevada, a notary public may:

- (a) Administer oaths or affirmations;
- (b) Take acknowledgments;
- (c) Certify copies; and
- (d) Execute jurats.

[NRS 240.060.](#)

A common example of a writing requiring the administration of an oath or affirmation is an affidavit. *See, Re Murphy*, 72 N.E.2d 413 (Mass. 1947). An acknowledgment is a public declaration or formal statement of the person executing an instrument made to an official authorized to take the acknowledgment that the execution of such instrument was his free deed and act. *McQuatt v. McQuatt*, 69 NE.2d 806 (Mass. 1946). It is a verification of the fact of the execution of an instrument, but not of its contents. *Bell and Zajicek, Inc., v. Heyward-Robinson, Co.*, 182 A.2d 339 (Conn. 1962).

An acknowledgment lends solemnity to the execution of an instrument and may, depending upon the circumstances, perform three different functions: (1) It may give validity to the instrument. *See, In re Teel's Estate*, 210 P.2d 1 (Cal. 1949); (2) It may permit the instrument to be introduced in evidence without proof of its execution. *Wester v. Lucas*, 57 P.2d 1179 (Okla. 1936); and (3) It may entitle the instrument to be recorded. *See, [NRS 111.310](#)*.

The taking of an acknowledgment or administration of an oath or affirmation by one not authorized by law may affect the validity of the underlying transaction. *See, e.g., National Bank of Commerce Trust & Sav. Assoc. v. Rhodes*, 295 N.W.2d 711 (Neb. 1980) (acknowledgment of a deed before one named therein is void.) *Storz Brewing Co. v. Kuester*, 132 N.W.2d 341 (Neb. 1965) (affidavit sworn to before attorney in the cause is not admissible as evidence.)¹ It is therefore important to ensure that one performing notarial acts is not disqualified from so acting.

Prior to the enactment of 1985 Nev. Stat., Ch. 426, subsections 4 and 5, courts had developed rules regarding the disqualification of persons performing notarial acts who had an interest in the underlying transaction. It has been stated that these rules rest upon grounds of public

¹An attorney should avoid this situation for an additional reason: It may place the attorney in the role of a witness, thus compromising his role as an advocate. *See, Porter v. Porter*, 274 N.W.2d 235 (N.D. 1979).

policy, the purpose being to close the door to temptation to fraud, *Lee v. Murphy*, 51 P. 549, 555 (Cal. 1897), and to ensure that proper probative force is accorded to notarial acts. *Musselshell*

Valley Farming and Livestock Co. v. Cooley, 283 P. 213 (Mont. 1929). Thus, a party to the instrument is disqualified from taking an acknowledgment. *La Fromboise v. Porter*, 246 N.W. 193 (Mich. 1933).

We now turn to the specific language of the Nevada statute:

A notary public may not perform any act authorized by [NRS 240.060](#) if he:

2. Will receive directly from a transaction relating to the instrument any commission, fee, advantage, right, title, interest, property, or other consideration in excess of the authorized fees.

1985 Nev. Stat., Ch. 426, subsection 4.

A notary public may not:

1. Influence a person to enter or not enter into a lawful transaction involving a notarial act performed by a notary.

1985 Nev. Stat., Ch. 426, subsection 5.

These provisions were only recently enacted and have not been construed by our State Supreme Court. We are guided, however, by some general principles of statutory construction:

The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained will prevail over the literal sense. [Citations omitted] The meaning of the words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject matter and the policy of the law may also be involved to aid in its interpretation, and it should always be construed so as to avoid absurd results.

Welfare Div. v. Washoe Co. Welfare Dept., [88 Nev. 635](#), 637-38, 503 P.2d 457 (1972).

Subsection 4 of the statute was drawn directly from the Model Notary Act, published September 1, 1984. Minutes of the Nevada State Legislature, Hearing on Senate Bill 208, Senate Committee on Government Affairs, March 13, 1985, p. 5. It follows, therefore, that the Legislature also adopted the construction intended by the drafters of the model act. See, *Nevada State Dept. Motor Vehicles v. Turner*, [89 Nev. 514](#), 517, 515 P.2d 1265 (1973). The commentary to this section states:

Under Section 3-102, a sales agent's commission is regarded as a disqualifying interest, as is an attorney's fee. A salaried employee or uninvolved coworker of the sale agent or attorney, however, would not be disqualified from notarizing. In addition, the Act prohibits notaries from notarizing the signatures of immediate family members, because of the high potential for a financial or emotional interest that would compromise impartiality.

Model Notary Act, Commentary, Article III, p. 17. It is apparent that the Legislature intended to prevent a conflict of interest from arising where the notary has a direct financial interest in the underlying transaction that could compromise his impartiality.

Unlike subsection 4, subsection 5 of the statute prohibits not merely the performance of a notarial act where a financial interest is involved, but the influencing of persons to enter or not enter into transactions involving the performance of a notarial act. This section also appears to have been derived from the Model Act. The Model Act, section 3-103, p. 15, provides, in

pertinent part: “A notary may not influence a person to enter into or not to enter into a lawful transaction involving a notarial act by the notary.”

Subsection 5 of the Nevada statute, however, by its express terms, appears to prohibit a person whose occupation requires him to influence persons with reference to transactions which require notarial acts from being a notary public. Under this construction, persons in those occupations would be faced with the choice of giving up either their occupation or their authority to perform notarial services. No reason appears in the legislative history of the statute for this change in language from the Model Act. One may ask how the impartiality of a notary involved in a transaction may be questioned if the notary abstains from notarizing any of the instruments involved in the transaction.

Statutes are to be construed in accordance with their plain meaning unless an absurd result occurs in its application. *Sierra Pac. Power v. Public Service Commission*, [92 Nev. 522](#), 525, 554 P.2d 263 (1976). We can discern no rational reason for the Legislature to have intended to prohibit all persons engaged in the occupations discussed herein from holding authority to perform notarial acts. The intent of the statute is to address the problem created by a notary having an interest, financial or otherwise, in the same transaction for which he is performing a notarial act. Therefore, we must construe subsections 4 and 5 in conjunction with case law and the policy expressed by the drafters of the Model Notary Act to achieve a result consistent with legislative intent. We therefore conclude that a literal reading of section 5(1) as enacted leads to an absurd result not contemplated or intended by the Legislature. The statute should be read, therefore, as prohibiting notaries from influencing persons to enter or not enter into lawful transactions where the notary will be performing a notarial act in that particular transaction.

Your general question is best analyzed with reference to some specific examples of how the situation may arise:

EXAMPLE 1

The attorney who assists his client in the preparation of an affidavit receives a legal fee for preparing the affidavit and notarizes the document. Similarly, the real estate agent notarizes his principal's signature on the deed to complete a transaction from which the agent will receive a commission.

EXAMPLE 2

The attorney who prepared the affidavit requests a partner in the same firm to notarize the document. Similarly, the real estate agent involved in the sale requests his supervising broker to notarize the deed.

EXAMPLE 3

The attorney who prepared the affidavit requests an associate attorney or his secretary to notarize the document. Similarly, the real estate agent involved in the sale requests an associate agent or secretary to notarize the deed.

EXAMPLE 4

A salaried escrow agent notarizes documents in an escrow he is administering. Similarly, a salaried loan officer notarizes documents in connection with a loan he has approved. Both the escrow agent and loan officer receive a bonus based upon the number of transactions they process in a month.

There are, of course, many possible variations of these basic situations; however, these examples will serve to illustrate the principles involved.

Applying the statute to the examples set forth above, it is clear that the attorney and real estate agent described in example 1 would be prohibited from notarizing a document in a transaction from which they expected to directly receive a fee or commission. This is the type of

direct financial interest which section 4 of the statute was intended to prohibit. It is equally clear that the situation described in example 3 would be permissible under the statute. The person notarizing in that situation would, by virtue of the salary they received, have at most only an indirect financial interest in the transaction. The statute was only intended to prohibit those with a direct financial interest from notarizing documents in the transaction.

Whether the situation described in example 2 would violate the statute would depend on how the law partner or real estate broker receives his compensation. If they receive a percentage of each fee or commission received by their associate, other partners, or sales agents, their financial interest in the transaction would be a direct one and they would be prohibited from notarizing. However, if the attorney or sales agent involved in the transaction pays no part of his fee or commission to the partner or broker, but merely pays for the privilege of associating with that person or pays part of the operating costs of the office out of his own earnings generally, the financial interest of the partner or broker would be so attenuated to prohibit him from notarizing the document. Because of the many variations possible in this situation, the facts of each case should be examined. Unless it is clear that the notarizing partner or broker receives no direct compensation from the transaction, this situation should probably be avoided.

The financial interest of the escrow agent or loan officer described in example 4 is not direct enough to come within the prohibition of subsection 4(2) of the statute. Although they receive additional compensation based upon the number of transactions processed, the additional compensation is unrelated to any specific transaction. However, persons in this situation should avoid notarizing documents relating to the transaction they are involved in because they have an incentive to influence the parties to the transaction. Such influence would run afoul of subsection 5(1) of the statute.

CONCLUSION

Notaries public whose occupations require them to influence persons with reference to transactions requiring the performance of notarial acts must not notarize instruments involved in the transaction in which they are assisting. They are not prohibited, however, from influencing persons with reference to such transactions, if they perform no notarial acts in connection with the transaction. Similarly, a notary public is disqualified from notarizing instruments involved in a transaction from which they will or expect to receive a direct financial benefit beyond the normal notarial fee. Uninvolved coworkers of the person assisting in the transaction may, however, perform notarial acts in connection with the transaction, so long as they receive no financial benefit directly related to the transaction other than the authorized notarial fee.

Sincerely,

BRIAN MCKAY, *Attorney General*

By DOUGLAS E. WALTHER, *Deputy Attorney General*

OPINION NO. 85-15 Constitutional Law—Education—Nevada’s “period of silence” in public schools statute, [NRS 388.075](#), is constitutional based upon the holding of the U.S. Supreme Court in *Wallace v. Jaffree*, 472 U.S., 86 L.Ed.2d 29, 105 S.Ct. 2479 (1985).

CARSON CITY, October 1, 1985

DR. EUGENE T. PASLOV, *Superintendent of Public Instruction*, Department of Education, Capitol

Complex, Carson City, Nevada 89710

DEAR DOCTOR PASLOV:

Your office has requested the opinion of this office upon the following question:

QUESTION

Is the Nevada “period of silence” in public schools statute, [NRS 388.075](#), constitutional in light of the recent U.S. Supreme Court decision in *Wallace v. Jaffree*, 472 U.S., 86 L.Ed.2d 29, 105 S.Ct. 2479 (1985)?

ANALYSIS

[NRS 388.075](#), enacted in 1977 and effective July 1, 1977, provides as follows:

Every school district shall set aside a period at the beginning of each school day during which all persons must be silent, for voluntary individual meditation, prayer or reflection by pupils.

In *Wallace v. Jaffree, supra*, the Supreme Court of the United States found an Alabama statute (Ala. Code § 16-1-20.1 (1975)), which authorized a daily period of silence in public schools for meditation or voluntary prayer, to be a state endorsement of religion lacking any clearly secular purpose and thus a law respecting the establishment of religion in violation of the First Amendment of the U.S. Constitution. The court reasoned that in light of the fact that the challenged statute was an almost verbatim reenactment of Ala.Code § 16-1-20 except for the addition of the words “or voluntary prayer” after “meditation,” and the fact that legislative history behind § 16-1-20.1 showed no secular purpose at all but was clearly and solely an effort to return voluntary prayer to the public schools, Alabama intended to characterize prayer as a favored practice. Such an endorsement of religion violated the Establishment Clause of the First Amendment, and Ala. Code § 16-2-20.1 (1975) was therefore unconstitutional. *Wallace v. Jaffree, supra*, at 2490-2492.

There is a strong presumption in favor of the constitutionality of legislative enactments and this principle has been consistently adhered to by our Supreme Court for many years. *Allen v. State of Nevada*, 100 Nev. Adv. Op. No. 20, February 24, 1984; *List v. Whisler*, [99 Nev. 133](#), 660 P.2d 104 (1983); *Viale v. Foley*, [76 Nev. 149](#), 350 P.2d 721 (1960); *Hard v. Depaoli*, [56 Nev. 19](#), 41 P.2d 1054 (1935). In case of doubt, every possible presumption is made in favor of the constitutionality of a statute, so that courts will interfere only when the constitution is clearly violated. *City of Reno v. County of Washoe*, [94 Nev. 327](#), 580 P.2d 460 (1978); *Mengelkamp v. List*, [88 Nev. 542](#) 501 P.2d 1032 (1972). Also, the presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional. *Ottenheimer v. Real Estate Division*, [97 Nev. 314](#), 629 P.2d 1203 (1981); *Damus v. County of Clark*, [93 Nev. 512](#), 569 P.2d 933 (1977). It is the long-standing policy of this office not to opine that a state statute is unconstitutional absent a clear showing and expression of such from the Supreme Court of the United States on the matter under review. Thus, the question here becomes whether the court’s decision and analysis in *Wallace v. Jaffree, supra*, clearly declared unconstitutional the statute of another state which could be characterized as being substantially similar to [NRS 388.075](#).

The test enunciated by the U.S. Supreme Court, which must be utilized to determine this issue, is that set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2111 (1971):

First, the statute must have a secular legislative purpose; second, its principal or primary

effect must be one that neither advances nor inhibits religion. (citation omitted); finally, the statute must not foster ‘an excessive government entanglement with religion’. (Citation omitted.)

As stated by the court in *Wallace v. Jaffree*, 105 S.Ct., at 2490, no consideration of the second or third *Lemon* test is necessary if a statute does not have a clearly secular purpose. While a statute that is motivated in part by a religious purpose may satisfy the first test, the First Amendment requires that a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion. *Wallace v. Jaffree, supra*, at 2490, n. 42. Clearly, this first test has not been held by the Court to require that a statute must have an *exclusively* secular purpose. However, at the very least, its primary purpose must be secular. *See also, Wallace v. Jaffree, supra*, at 2494 (Powell, J., concurring).

While the record before the court revealed that the enactment of Ala. Code § 16-1-20.1 (1975) was not motivated by any clearly secular purpose, and in fact, had no secular purpose, the record reviewed by our office discloses, in our opinion, that the enactment of [NRS 388.075](#) was motivated by a clearly secular purpose, albeit not an exclusively secular purpose. The legislative history behind [NRS 388.075](#) discloses that as first drafted and submitted to the 1977 Session of the Nevada Legislature as A.B. 300, its language read simply:

Every school district shall set aside a silent period for voluntary individual prayers by pupils at the beginning of each school day.

At the public hearing on this draft of A.B. 300 before the Assembly Education Committee on February 28, 1977, the sponsor of A.B. 300, Assemblyman Nash Sena, and others, provided testimony which cannot be reasonably categorized as providing any evidence of *any* secular purpose. *See Nevada Legislature, 59th Sess., Minutes of Assembly Education Committee, pages 1-3 (February 28, 1977)*. Indeed, A.B. 300 at this stage of its history was merely an attempt to return voluntary prayer into the public schools. If A.B. 300 had remained in this form and had been enacted into law as [NRS 388.075](#), *Wallace v. Jaffree, supra*, would have required this office to be of the opinion that this statute was unconstitutional.

However, A.B. 300 did not remain in this form for long. A.B. 300 was amended on the floor of the Assembly on March 17, 1977, by Amendment No. 320A, which was proposed by the Assembly Education Committee and which simply rearranged and added to the wording. *See Nevada Legislature, 59th Sess., Minutes of Assembly Education Committee, pp. 1-2 (March 14, 1977); Journal of the Assembly, 59th Sess. pp. 387-388 (March 17, 1977); A.B. 300, 59th Sess., First Reprint*.

While admittedly this particular amendment did little if anything to remove the cloud of unconstitutionality from A.B. 300, the bill was again amended. On March 23, 1977, Assemblyman Kosinski proposed Amendment No 429A on the floor of the Assembly which deleted the word “prayers” and inserted in its stead the words “meditation, prayer or reflection.” This amendment was adopted unanimously by the Assembly and incorporated into the second reprint of A.B. 300. *See Journal of the Assembly, 59th Sess., p. 473 (March 23, 1977) and A.B. 300, 59th Sess., Second Reprint*.

In his remarks made on the floor in support of his Amendment No. 429A to A.B. 300, Assemblyman Kosinski stated:

I feel that the language in here, must be silent for voluntary individual prayer, even though the word “voluntary” is used, I believe it could very well be interpreted to mean that everyone is supposed to pray during this period of silence and I feel that by adding in these extra words “meditation” and adding the word “reflection,” that not only does it

indicate that as a matter of policy is [it] is not our intention to require prayer but I think it may also help the bill to withstand any possible constitutional challenges at a later date.

Tape Recording of the Nevada Assembly, 59th Sess., 66th day (March 23, 1977).

Assemblyman Sena, the leading sponsor of A.B. 300, also spoke out on the floor of the Assembly in favor of the adoption of Amendment No. 429A, remarking:

I rise in support of this amendment for several reasons. One, it is certainly the intention of myself and my co-sponsors to make this bill as palatable to everyone because certainly we do not want to harass persons or other persons if this bill should go into effect, and for this reason I ask your support for this amendment.

Tape recording of the Nevada Assembly, *supra*.

A.B. 300 was adopted in this form and approved by the Assembly on March 25, 1977, by a 36-3 vote. In official remarks on A.B. 300, Assemblyman Horn stated that:

A.B. 300 does not force anyone to pray—only to be silent to allow those who wish to reflect, or meditate, or pray the right to do so. If they choose not to pray, or reflect, or meditate, their right not to do so had not been violated.

. . . I think that we should pass A.B. 300 so that we can begin anew to reinforce our basic freedom to reflect, to meditate, or to communicate with our Maker.

Journal of the Assembly, 59th Sess., pp. 488-489 (March 25, 1977).

A similar legislative history for A.B. 300 may be found in the records of the Senate Committee on Human Resources and Facilities and the Journal of the Senate for the 59th Session.

Our office is of the opinion that this legislative history establishes that [NRS 388.075](#) was enacted with a clearly secular legislative purpose, albeit not an exclusively secular purpose. While [NRS 388.075](#) may have been motivated in part by a religious purpose, it was not *entirely* motivated by a purpose to advance religion. This legislative history distinguishes [NRS 388.075](#) from Ala. Code § 16-1-20.1 (1975) and likens it to that of Ala. Code § 16-1-20 which was tacitly approved by the Court in *Wallace v. Jaffree*, 105 S.Ct., at 2481-2482 and 2491-2493. The legislative history here is exactly the opposite of Ala. Code § 16-1-20.1 (1975), in that at the time of enactment of A.B. 300 in its final form, there was a secular purpose behind the statute.

As the court said in *Wallace v. Jeffree, supra*, at 2491:

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day.

In citing this language of Justice Stevens' opinion, Justice Powell expressed his concurrence with Justice O'Connor's assertion that "some moment-of-silence statutes may be constitutional." *Wallace v. Jaffree, supra*, at 2493 (Powell, J., concurring). In Footnote 2, Justice Powell goes on to note that, "Justice O'Connor is correct in stating that moment-of-silence statutes cannot be treated in the same manner as those providing for vocal prayer." See *Wallace v. Jaffree*, 105 S.Ct., at 2498-2499 (O'Connor, J., concurring).

Having concluded that [NRS 388.075](#) satisfies the first *Lemon* test, that the statute does have a secular legislative purpose, our inquiry must now turn to whether the statute satisfies the two other remaining tests set forth in *Lemon v. Kurtzman, supra*.

While the majority opinion did not provide any guidance or discussion concerning the application of the last two *Lemon* tests to a "period of silence" statute (See *Wallace v. Jaffree*,

105 S.Ct., at 2490), fortunately, Justices Powell and O'Connor did reach and discuss these issues in the context of a "period of silence" statute.

As stated by Justice Powell in his concurring opinion:

I would vote to uphold the Alabama statute if it also had a clear secular purpose. . . . Nothing in the record before us, however, identifies a clear secular purpose, and the State also has failed to identify any non-religious reason for the statute's enactment . . . [Footnote omitted.]

Although we do not reach the other two prongs of the *Lemon* test, I note that the "effect of a straightforward moment-of-silence statute is unlikely to "advanc[e] or inhibi[t] religion. . . . (Footnote and citation omitted.) Nor would such a statute "foster 'an excessive government entanglement with religion' " (Citation omitted.)

Wallace v. Jaffree, 105 S.Ct. at 2495 (Powell, J., concurring).

As stated by Justice O'Connor in her concurring opinion, "a state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer of bible reading." *Wallace v. Jaffree*, *supra*, at 2498 (O'Connor, J., concurring). Later in her opinion, Justice O'Connor also stated that:

The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. . . . A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass this test.

The analysis above suggests that moment of silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect. Alabama Code § 16-1-20.1 (Supp. 1984) does not stand on the same footing. However deferentially one examines its text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools. . . .

. . . .
. . . . In light of the legislative history and the findings of the courts below, I agree with the Court that the State intended Alabama Code § 16-1-20.1 to convey a message that prayer was the endorsed activity during the state-prescribed moment of silence. [Footnote omitted.] While it is therefore unnecessary also to determine the effect of the statute, *Lynch*, 465 U.S., at, 104 S.Ct. at 1366 (concurring opinion), it also seems likely that the message actually conveyed to objective observers by Alabama Code § 16-1-20.1 is approval of the child who selects prayer over other alternatives during a moment of silence.

Wallace v. Jaffree, 105 S.Ct., at 2501-2502 (O'Connor, J., concurring).

This office is of the opinion that [NRS 388.075](#) is a "straightforward" moment-of-silence statute and does not "advance or inhibit religion," nor "foster an excessive government entanglement with religion." By mandating a moment of silence, the State of Nevada has not necessarily endorsed nor expressed a preference for any activity that might occur during the period, *i.e.*, meditate, pray, or reflect. *Wallace v. Jaffree*, *supra*, at 2499 (O'Connor, J., concurring). "Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." *Wallace v. Jaffree*, *supra* (O'Connor, J., concurring).

Notwithstanding the above, we recognize that a moment of silence statute as actually

implemented could effectively favor the child who prays over the child who does not. For example, the message of unconstitutional endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray, notwithstanding the facial neutrality of a statute such as [NRS 388.075](#). While actual implementation of [NRS 388.075](#) in such a manner would be clearly unconstitutional, the mere possibility that the statute could be implemented in such a manner is not sufficient to render the statute a nullity on its face. As stated by Justice O'Connor:

The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer. [Footnote omitted.] This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it *operates* as an endorsement of religion. (Citation omitted.) (Emphasis added.)

Wallace v. Jaffree, 105 S.Ct., at 2499 (O'Connor, J., concurring).

For the foregoing reasons, our office is of the opinion that [NRS 388.075](#) does not violate the First Amendment of the U.S. Constitution since the statute satisfies each of the three *Lemon* tests as applied to "period of silence" statutes, in light of the specific guidance provided in this area by *Wallace v. Jaffree, supra*. It is our opinion that [NRS 388.075](#) is constitutional within the parameters of *Wallace v. Jaffree, supra*.

CONCLUSION

Nevada's "period of silence" statute, [NRS 388.075](#), is constitutional and enforceable under the recent decision of the U.S. Supreme Court in *Wallace v. Jaffree*, 472 U.S., 86 L.Ed.2d 29, 105 S.Ct. 2479 (1985).

Sincerely,

BRIAN MCKAY, *Attorney General*

OPINION NO. 85-16 Criminal Law—Use of [NRS 193.167](#) in connection with a misdemeanor to enhance maximum possible penalty to one year requires jury trial in justice court, municipal court limited in jurisdiction to penalties in six months or less.

CARSON CITY, October 2, 1985

JOHN R. MCGLAMERY, ESQUIRE, *Assistant City Attorney*, P.O. Box 1900, Reno, Nevada 89505

DEAR MR. MCGLAMERY:

You have requested the opinion of this office regarding the effect of [NRS 193.167](#) on the jurisdiction over misdemeanor assault and battery cases. Specifically, you have asked whether the penalty enhancement set forth in [NRS 193.167](#), when applied to a misdemeanor assault or battery case, affects the jurisdiction of municipal and justice courts in Washoe County. You have set forth your questions as follows:

QUESTIONS

1. Since [NRS 193.167](#) is not a separate offense, does the extension of the possible penalty

to a one year jail term remove it from the status of a misdemeanor offense?

2. If the enhancement caused by [NRS 193.167](#) does not cause the status of the underlying offense to change from a misdemeanor offense, is the City of Reno therefore able to enact the provisions of [NRS 193.167](#) as a city ordinance?

3. Which court has the jurisdiction to hear those cases in which [NRS 193.167](#) is applicable?

ANALYSIS

The Nevada Constitution provides in Article 6, §§ 8 and 9, that the jurisdiction of justice and municipal courts is to be established by law. Relevant provision of Nevada statute establishing the criminal jurisdiction of municipal and justice courts are set forth as follows:

...
Justices' courts have jurisdiction of all misdemeanors and no other criminal offenses except as provided by specific statute.

...
[NRS 4.370\(3\)](#).

The municipal courts have jurisdiction of all misdemeanors committed in violation of the ordinances of their respective cities.

1985 Nev. Stat., Ch. 61, § 2. *See also*, [NRS 266.555\(1\)](#) and (2).

These statutes make it clear that both municipal and justice courts have jurisdiction over misdemeanors, although the misdemeanor must be the subject to a city ordinance in order for municipal court jurisdiction to exist.

A municipal ordinance must be passed by the city council and must not be contrary to the Constitutions of the United States and Nevada, or contrary to the laws governing municipal corporations. *See* [NRS 266.105](#). Furthermore, the city council is given the power to enforce such ordinances by punishing any offense in the manner provided by law for misdemeanors. *Id.* *See also*, [NRS 266.321](#).

The penalty enhancement which you have brought to our attention is [NRS 193.167](#). That statute provides as follows:

1. Any person who commits the crime of:
(a) Assault;
(b) Battery;
(c) Kidnaping;
(d) Robbery;
(e) Sexual assault; or
(f) Taking money or property from the person of another, against any person who is 65 years of age or older shall be punished by imprisonment in the county jail or state prison, whichever is applicable, for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime. The sentence prescribed by this section must run consecutively with the sentence prescribed by statute for the crime.

2. This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.

The general punishment for a misdemeanor is prescribed by statute as follows:

1. Every person convicted of a misdemeanor shall be punished by imprisonment in the county jail for not more than 6 months, or by a fine of not more than \$1,000, or by both fine and imprisonment, unless the statute in force at the time of commission of such misdemeanor prescribed a different penalty.

2. In lieu of all or a part of the punishment which may be imposed pursuant to subsection 1, if the convicted person agrees, he may be sentenced to perform a fixed period of work for the benefit of the community under the conditions prescribed in [NRS 176.087](#).

[NRS 193.150](#).

Thus, if the penalty enhancement provided in [NRS 193.167](#) is applied to misdemeanor assault or battery, the maximum sentence of imprisonment in the county jail could be one year (six months consecutive to six months). It is important to note the [NRS 193.167\(2\)](#) specifically negates any suggestion that the enhancement creates a separate offense. By its own terms, [NRS 193.167](#) merely provides an additional penalty for the primary offense. Nothing in this enhancement statute suggests an intent to affect the character of the primary offense.

The Nevada Supreme Court has had occasion to examine this provision of Nevada law. In *Carter v. State*, [98 Nev. 331, at 335](#) (1982), the Supreme Court held that Nevada law does not mandate that this enhancement be made consecutive to any additional enhancement, such as the deadly weapon enhancement provided in [NRS 193.165](#), and further the statute does not violate due process or equal protection. The Nevada Supreme Court has consistently ruled that this penalty enhancement and others do not create a separate crime, but rather the enhancement merely creates an additional penalty for the primary offense. *See, Boyle v. Warden*, [95 Nev. 888](#)(1979); *Woofter v. O'Connell*, [91 Nev. 756](#) (1975) *Biffath v. Warden*, [95 Nev. 260, 263](#) (1979); *Director, Dep't of Prisons v. Biffath*, [97 Nev. 18, 19](#) (1981).

Our research has revealed no case authority in Nevada or elsewhere in direct support of the suggestion that the additional six month penalty by enhancement operates to convert the primary offense to a gross misdemeanor, thereby ousting a municipal or justice court of jurisdiction. However, because we believe that a right to a jury trial exists when the maximum possible penalty is in excess of six months, the municipal court would not be able to try such cases, since there is no right to a jury trial in municipal court. In fact, [NRS 266.550](#) specifically provides that all trials in municipal courts shall be summary and without a jury. Therefore, where the maximum possible penalty through enhancement would be one year, the criminal defendant would have a right to a jury trial which is available in justice court. *See, NRS 175.011(2)*.

Our conclusion, that there is a substantive right to a jury trial where the punishment for a misdemeanor may be enhanced by an additional six month sentence, is based upon United States and Nevada Supreme Court decisions. The Nevada Supreme Court in *State v. Smith*, [99 Nev. 806, at 807-808](#) (1963), has relied on relevant United States Supreme Court case authority as follows:

Persons are guaranteed the right to a jury trial by both art. I, section 3 of the Nevada Constitution, and the sixth amendment to the United States Constitution. Despite apparently significant differences in the language of these constitutional provisions, both provisions have been interpreted to guarantee the right to a jury trial in a criminal matter only as it existed at common law. Thus, there is no constitutional right to trial by jury for "petty" offenses. *See Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968); *State v. Ruhe*, [24 Nev. 261](#), 62 P.274 (1898). Whether there is a constitutional right to a trial by jury therefore turns upon whether the offense charged is characterized as "serious" or "petty." *See Duncan v. Louisiana*, 391 U.S. at 159. In turn, the principal criterion used

in characterizing an offense as “petty” or “serious” is the severity of the maximum authorized penalty. *See Baldwin v. New York*, 399 U.S. 66, 68, 90 S.Ct. 1886 (1969); *Bloom v. Illinois*, 319 U.S. 194, 211, 88 S.Ct. 1477 (1968).

In recent decisions, the United States Supreme Court has increasingly relied upon the objective criterion of the maximum possible penalty in deciding whether to characterize an offense as “petty” or “serious.” *See Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697 (1974); *Codispoti v. Pennsylvania*, 418 U.S. 605, 94 S.Ct. 2687 (1974). Using this criterion, the Court has held that where the maximum possible penalty is six months imprisonment or less, the offense is “petty,” and the right to trial by jury does not attach. *See Codispoti v. Pennsylvania*, 418 U.S. at 512.

Accordingly, we look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is “petty” and the right to trial by jury does not attach.

See also, Maita v. Whitmore, 508 F.2d 143, 145 (9thCir. 1974) (If penalty authorized by Legislature exceeds six months, right to jury trial attaches). *Contra, Bruce v. State*, 614 P.2d 813 (Ariz. 1980) (No right to jury trial in simple assault or battery, since such crimes were not subject to jury trial at common law).

Although other criteria are also considered in deciding whether or not there is a right to a jury trial, the Nevada Supreme Court has held in *Smith*, quoted *supra*, that the overriding consideration is whether or not the maximum possible penalty is in excess of six months. Thus, in spite of the fact that a simple assault or battery was not a crime for which a jury trial was afforded at common law, a jury trial in such cases would be required where, because of penalty enhancement, the maximum possible penalty is in excess of six months. The jury trial of a simple assault or battery where the victim is 65 years of age or older can proceed only in justice court when the prosecutor seeks to invoke the penalty enhancement statute. *See, NRS 175.011(2)*.

In view of our foregoing conclusion, there would not be any need to enact [NRS 193.167](#) as a city ordinance since such an ordinance would automatically preclude the trial of any misdemeanor subject to that enhancement in municipal court. These cases, when committed within a city, should be prosecuted under the relevant state statutes in justice court.

The foregoing discussion has also answered your third question as to which court has jurisdiction to try these offenses.

CONCLUSION

The enhancement for the punishment of a misdemeanor assault or battery under [NRS 193.167](#) does not change the character of the offense as a misdemeanor. However, the criminal defendant is constitutionally entitled to a jury trial since the maximum possible penalty is in excess of 6 months. The jury trial on these offenses can proceed only in justice court. A municipal corporation need not enact the provisions of [NRS 193.167](#) as a city ordinance.

Very truly yours,

BRIAN MCKAY, *Attorney General*

By BROOKE A. NIELSEN, *Chief Deputy Attorney General,*
Criminal Division

OPINION NO. 85-17 Gaming—Casino Entertainment Tax—[NRS 463.401](#) does not apply to rock concerts held on the premises of a gaming establishment where the concert is held in an outdoor stadium or in an auditorium separate from casino lounges or showrooms.

CARSON CITY, November 12, 1985

MR. DENNIS AMERINE, *Chief*, Audit Division, State Gaming Control Board, Building D, Suite 735, 4220 South Maryland Parkway, Las Vegas, Nevada 89158

DEAR MR. AMERINE:

You requested an opinion from this office relative to the following:

QUESTION

Does the casino entertainment tax of [NRS 463.401](#) (1983) apply to rock concerts held either outdoors in a stadium or in an auditorium separate from casino lounges and showrooms?¹

ANALYSIS

Knowledge of the origins and history of the casino entertainment tax is essential in analyzing whether a particular form of entertainment is covered by the tax. The original casino entertainment tax was passed in 1965 at the urging of Governor Grant Sawyer as a revenue measure. *Journal of the Senate*, 53d Sess., at 619-26 (Nev. Apr. 3, 1965). The original casino entertainment tax was based upon the federal cabaret tax. [NRS 463.401](#)(1) (1965) was very similar in language to 26 U.S.C. § 4232(b) (1964), which provided the definition of “roof garden, cabaret, and other similar places” for the imposition of the federal cabaret tax

¹[NRS 463.401](#) (1983) was amended to specifically exclude outdoor concerts from the casino entertainment tax. Act of June 2, 1985, ch. 440, 1985 Nev. Stat. 1260. Therefore, the portion of this opinion concerning outdoor rock concerts would only apply to rock concerts held outdoors on the premises of a gaming establishment prior to July 1, 1985.

contained in 28 U.S.C. § 4231(6) (1964).² [NRS 463.401](#)(2) (1965) imposed the casino entertainment tax on a licensee based upon a percentage of the federal cabaret tax. Therefore, there was a direct tie between the original casino entertainment tax and the federal cabaret tax.

The federal cabaret tax was only one subsection of 28 U.S.C. § 4231 (1964), which generally imposed taxes on admissions to events of all kinds. The history of the federal cabaret tax began in 1917 when Congress imposed a tax in the nature of an admission tax upon entertainment and other events. Congress had difficulty, however, imposing this tax upon a category of entertainment in existence at that time known as “cabarets,” which usually made no admission charge but rather included the price of admission in the amounts charged for refreshments, service, or merchandise. Congress solved the problem by imposing a 10 percent tax on the amounts paid for the refreshments, service, or merchandise. *Geer v. Birmingham*, 88 F.Supp. 189, 197 (N.D. Iowa), *rev'd*, 185 F.2d 82 (8th Cir. 1950), *cert. denied*, 340 U.S. 951 (1951).

From this history of the federal cabaret tax, it is clear that the federal cabaret tax was never intended to cover those activities with which admission charges are normally associated. This would include the entertainment activities that were on the Nevada scene in 1965 such as showrooms and lounges that often had no direct charge for admission. Rock concerts or similar special entertainment events had not yet arrived.

The next important step in the history of the casino entertainment tax was the legislative amendments of 1967. The federal cabaret tax had been repealed by Congress. Act of June 21, 1965, Pub. L. No. 89-44, § 301, 79 Stat. 145. Accordingly, the Nevada Legislature repealed all the obsolete references to the federal cabaret tax. However, [NRS 463.401](#)(1) (1967) still contained the same language that was similar to the language

²[NRS 463.401](#) (1956) provided in part:

1. In addition to any other license fees and taxes imposed by this chapter, a tax, to be known as the casino entertainment tax, is hereby levied upon each licensed gaming establishment in this state *where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise.* (Emphasis added.)

Title 26 U.S.C. § 4232(b) (1964) provided in part:

The term “roof garden, cabaret, or other similar place,” as used in this chapter, shall include any room in any hotel, restaurant, hall, or other public place *where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connections with the serving or selling of food, refreshment, or merchandise.* In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a “roof garden, cabaret, or other similar place.” (Emphasis added.)

contained in 26 U.S.C. § 4232(b) defining “cabaret.” [NRS 463.401](#)(2) (1967) imposed a tax of “10 percent of all amounts paid for admission, merchandise, refreshment or service.”

The main question after the 1967 amendments was whether the casino entertainment tax had been changed into a general admissions tax on casino entertainment or whether it was still tied to the legal concepts surrounding the federal cabaret tax. It was this office’s position that the elimination of any references to the federal cabaret tax and the addition of language in [NRS 463.401](#)(2) (1967) imposing an independent 10 percent tax on admissions, merchandise, refreshment, or service meant that the Legislature intended the tax to have a broader scope than the original casino entertainment tax.

The Nevada Supreme Court then rendered its opinion in *Cashman Photo Concessions and Labs, Inc. v. Nevada Gaming Commission*, [91 Nev. 424](#), 538 P.2d 158 (1975). The issue in that case was whether the casino entertainment tax applied to charges for photographs taken and sold to patrons of casino showrooms. The Supreme Court ignored the language of [NRS 463.401](#)(2) (1967) and ruled that the tax could only be imposed on food refreshments, or merchandise under [NRS 463.401](#)(1) (1967). Since the selling of photographs was construed to be a service and not merchandise under the federal cabaret tax, the casino entertainment tax was held not to apply to these photographs. 91 Nev. at 427.

Cashman Photo was seen by this office to have four important principles for future casino

entertainment tax litigation. First, any ambiguities in the statute would be construed in favor of the taxpayer. Second, the casino entertainment tax was derived from and patterned after the federal cabaret tax and any ambiguities would be resolved by reference to judicial interpretations of the federal cabaret tax. Third, an administrative body could not impose a tax under the statute unless the tax was expressly provided for in the statute. And fourth, any additional entertainment activities not covered by the federal cabaret tax could not be taxed under the statute unless specifically provided for by legislative amendments.

In 1977, the Gaming Control Board and the Gaming Division of the Attorney General's Office appeared before the Senate Taxation Committee and recommended changes in the casino entertainment tax. At that hearing, the chairman of the State Gaming Control Board suggested that the casino entertainment tax be made broader in scope and become a general admissions tax.

The chairman also suggested that a complete break be made with the federal cabaret tax so that the board would not be burdened with an archaic body of law. Transcript, Senate Taxation Committee (Jan. 27, 1977). However, no legislative changes were made in 1977.

An unforeseen result of the *Cashman Photo* case was that showrooms that charged flat admission fees did not have to pay the casino entertainment tax on the admissions. In 1979, the State Gaming Control Board through State Senator Mike Sloan introduced Senate Bill 453, which made admissions to showrooms and lounges taxable under the casino entertainment tax. S.B. 453 (Apr. 11, 1979). At the hearings on the bill, the chairman of the State Gaming Control Board made it clear that the bill was not intended to expand the tax beyond the casino showrooms and lounges taxable under the federal cabaret tax. Instead, the bill was designed only to close the loophole concerning paid admissions created by the *Cashman Photo* case. However, counsel for the Nevada Resort Association expressed concern that the language in the bill could be interpreted as expanding the categories of entertainment subject to the tax. Minutes of Joint Assembly and Senate Committees on Judiciary (Apr. 24, 1979); Transcript, Hearings on Senate Bill 453 Before the Joint Session of Senate and Assembly Judiciary Committees 1-11 (Apr. 24, 1979). The State Gaming Control Board and counsel to the Nevada Resort Association then agreed to language that would make admission charges to casino showrooms and lounges taxable, but that would keep the old language tying the tax conceptually to the federal cabaret tax. Letter from counsel of Nevada Resort Association to Senator Mel Close (Apr. 25, 1979). The bill was revised accordingly and enacted. Revised S.B. 453 (Apr. 11, 1979); Act of June 5, 1979, ch. 664, §§ 1-4, 1979 Nev. Stat. 1558 (codified at [NRS 463.401](#)).

The legislative history of the casino entertainment tax after *Cashman Photo* demonstrates that all attempts by Nevada gaming authorities to break the connection between the casino entertainment tax and the federal cabaret tax or to expand the tax into a general admissions tax have been defeated. As a result, the casino entertainment tax is still burdened by the archaic concepts surrounding the old federal cabaret tax. Given this legislative history the Nevada Supreme Court is likely to construe [NRS 463.401](#) narrowly and apply it to activities outside of the showrooms and lounges only if those activities are well within the old federal cabaret tax.

The question now becomes whether a rock concert given either outdoors in a stadium or inside an auditorium in a gaming establishment was within the parameters of the old federal cabaret tax. In *Geer v. Birmingham*, 88 F.Supp. 189 (N.D. Iowa 1950), *rev'd*, 185 F.2d (8th Cir. 1950), *cert. denied*, 340 U.S. 951 (1951), the district court had the opportunity to interpret the language of the federal cabaret tax then contained in 26 U.S.C. § 1700(e) (1950). The court had to decide whether the tax applied to a large ballroom to which admission was charged and where drinks were served in a lounge and booths. The Internal Revenue Service argued that the explicit language of the tax applied to the ballroom and that the tax was not tied to traditional concepts of roof gardens, cabarets, or nightclubs. The Internal Revenue Service argued that the definition of those types of entertainment settings had been expanded by the actual language contained in the statute. The taxpayer argued that Congress intended roof gardens and cabarets to have their ordinary meaning. After conducting a long and complex analysis of the congressional and

administrative history of the statute, the court agreed with the taxpayer and held that Congress intended the tax to cover only cabarets, roof gardens, and similar type entertainment settings and did not intend it to cover a ballroom operated like the one present in that case.³

The district court in *Geer* also attempted to define the words “roof gardens, cabarets, or other similar entertainments.”

The word “cabaret” is a French word of unknown origin which has been in use in English-speaking countries since at least the 17th Century. See, *The Oxford English Dictionary* (Second Edition). In *Webster’s New International Dictionary* (Second Edition) the word is defined as, “A cafe or restaurant where patrons are entertained by performers who dance and sing after the practice of certain French taverns.” In the *Universal Dictionary of the English Language* the word is defined as, “Small drinking place or night restaurant in which singing or dancing performances are given.” In a *Dictionary of American-English* the word cabaret is defined as, “A restaurant which provides entertainment by singers, dancers, etc.” In *Webster’s New International Dictionary* (Second Edition) the term “roof garden” is defined as follows: “A garden on a flat roof of a building: esp., a garden where refreshments are served, on the roof of a high building, often with a stage for entertainment.” From the legislative history of the statute in question hereinafter given it appears that Congress made use of the term “roof garden” to define the word “cabaret” more precisely.

.....
It appears from the testimony of those witnesses that in the amusement trade the term “nightclub” is customarily and ordinarily used as a synonym for “cabaret.” In their testimony the witnesses used those words interchangeably. In one of the more recent dictionaries, *The New Dictionary* (1947), the word “cabaret” is defined as, “a nightclub featuring entertainment by singers and dancers.”

³The district court in *Geer* was reversed by the Eighth Circuit Court of appeals in *Birmingham v. Geer*, 185 F.2d 82 (8th Cir. 1950), *cert. denied*, 340 U.S. 951 (1951). The Eighth Circuit decided to follow the reasoning of the Court of Appeals for the Seventh Circuit in *Avalon Amusement Corp. v. United States*, 165 F.2d 653 (7th Cir. 1948), which had held admissions paid to enter a ballroom to be taxable under the federal cabaret tax under the more expansive interpretation of the language of that statute. However, Congress specifically reaffirmed the principles set forth by the district court in *Geer* when it amended the federal cabaret tax in 1951. *Jones v. Fox*, 162 F.Supp. 449, 459 (D. Md. 1957). These amendments specifically excluded ballrooms unless they also happened to be a cabaret, roof garden, or other similar place. These amendments to the federal cabaret tax were in effect when the casino entertainment tax was adopted by Nevada in 1965. See *supra* note 2. Therefore, the rulings and analysis of the district court in *Geer* that were used to decide subsequent federal cabaret tax cases also apply to cases concerning Nevada’s casino entertainment tax.

88 F.Supp. at 193-94.

Therefore, according to the court in *Geer*, the federal cabaret tax applied to a certain type of entertainment setting that depended on the character of the entertainment provided or on a certain dominant aesthetic or emotional effect or appeal associated with the concepts of cabaret, roof garden, and nightclubs.

Applying these principles, it is obvious that the type of rock concert that forms the basis of this opinion is clearly not within the concepts of a cabaret, roof garden, nightclub, or some

similar place that forms the heart of both the federal cabaret tax and the casino entertainment tax. Large rock concerts in these settings constitute a different form of entertainment that generates a completely different aesthetic or emotional effect or appeal.

CONCLUSION

The casino entertainment tax does not apply to rock concerts held either in an outdoor stadium or in an auditorium inside the gaming establishment apart from the showrooms and lounges. Any attempt to apply the casino entertainment tax to these activities would have little chance of successfully withstanding a court challenge given the legislative, judicial and administrative history of the tax.

Sincerely,

BRIAN MCKAY, *Attorney General*

By THOMAS C. NAYLOR, *Deputy Attorney General,*
Gaming Division

OPINION NO. 85-18 Mining Claims; County Recorders; Imposition and Collection of Mining Claim Fees Upon Filing of Certain Documents by County Recorders—The 1985 Nevada Legislature enacted a revenue statute requiring county recorders to collect fees for the recordation of seven expressly enumerated documents related to mining claims. These mining claim fees must be collected only upon recordation of the enumerated documents on a “per claim” basis and for no other recordation. 1985 Nev. Stat. Ch. 489; [NRS 517.050-517.230](#) (1985).

CARSON CITY, December 5, 1985

MR. RICHARD L. REYBURN, *Executive Director*, Nevada Department of Minerals, 400 West King Street, Suite 106, Carson City, Nevada 89710

DEAR MR. REYBURN:

This letter is in response to your request of October 17, 1985, for an opinion of the Attorney General relative to the collection of mining claim filing fees by the respective county recorders. In your letter you present five inquiries for consideration by this office. Each of these questions will be addressed separately in this opinion.

ANALYSIS

Nevada statute provides in relevant part that:

Each filing pursuant to [NRS 517.050](#), [517.080](#), 517.110, 517.140, 517.170, 517.200 and 517.230 must be submitted with a fee of \$0.75 per claim. The county recorder shall collect the fee and quarterly pay the money collected to the state treasurer for deposit in the state treasury to the credit of the fund for the department of minerals.

1985 Nev. Stat., ch. 489, § 2.6, at 1704, *amending* 1983 Nev. Stat., ch. 627, § 79, at 2095.

Review of the statutory provisions enumerated in chapter 489 indicates that a mining claim

fee must be collected by the county recorder upon the filing of (1) lode claim certificates of location, *see* [NRS 517.050](#)(1) (1985); (2) lode claim relocation certificates, *see* [NRS 517.080](#)(2) (1985); (3) placer claim certificates of location, *see* [NRS 517.110](#)(1) (1985); (4) mill site certificates of location, *see* [NRS 517.110](#)(1) (1985); (4) mill site certificates of location, *see* [NRS 517.140](#)(1) (1985); (5) tunnel right certificates of location, *see* [NRS 517.170](#)(1); (1985); (6) amended certificates of location, *see* [NRS 517.200](#)(1) (1985); and, (7) affidavits of labor or improvements, *see* [NRS 517.230](#)(1) (1985). A notice of intent to hold document does not appear within the statutes delineated by section 2.6 of chapter 489. Moreover, notices of intent to hold are not recognized whatsoever by Nevada mining claim statutes. *See* [NRS 517.010-517.460](#) (1985), *as amended by*, 1985 Nev. Stats., ch. 489.

By contrast, federal statute and regulation refer to this document with reference to unpatented mining claims under the Federal Land Policy and Management Act of 1976. *See* 43 U.S.C. § 1744 (1982) and Supp. I 1983); 43 C.F.R. §§ 3833.0-1 to 3833.0-3, 3833.05, 3833.1-1 to 3833.1-3, 3833.2 to 3833.2-4, and 3833.3 to 3833.5 (1985). A “notice of intention to hold a mining claim” is defined as “an instrument containing the information required in [the code of federal regulations] which has been or will be filed under state law in the local jurisdiction indicating that the owner continues to have an interest in the claim.” 43 C.F.R. § 3833.0-5(k) (1985). *Cf.* 43 C.F.R. § 3833.0-5(1) (1985) (notice of intent to hold mill or tunnel site).

Under federal law, a notice of intent to hold document generally does not “relieve the owner of complying with federal or state laws pertaining to the performance of annual assessment work.” 43 C.F.R. § 3833.2-3(a) (1985). The notable exception to this general rule provides that:

Section 314 of the Act (43 U.S.C. 1744) requires that the owner of an unpatented mining claim shall file, prior to December 31st of each year following the calendar year in which the claim was located, either a notice of intent to hold the claim or evidence of annual assessment work. The General Mining laws (30 U.S.C. 28) allow the required annual assessment work to be initiated in the assessment year following the assessment year in which the claim was located. *Therefore, in order to comply with the filing requirements of section 314 of the Act, claimants of mining claims located after 12 o'clock noon on September 1st of that same year, shall file with the proper BLM office, a notice of intent to hold the mining claim in the first calendar year following its location.* This does not apply to the claimant who elects to perform his assessment work early and wishes to record the assessment work. 43 C.F.R. § 3833.2-1(d) (1985). (Emphasis added.)

The Nevada Legislature was presumed to have complete knowledge of the federal law governing notices of intent to hold a mining claim when the state mining claim fee statute was enacted during the 1983 session and amended in the sixty-third session. *See, e.g., City of Boulder v. General Sales Drivers*, [101 Nev. 117](#), 694 P.2d 498, Nev. Adv. Op. 26 (1985); *Ronnow v. City of Las Vegas*, [57 Nev. 332](#), 366, 65 P.2d 133 (1937). Revenue generating legislation is strictly construed in favor of the taxpayers and such a statute “must say what it means.” *Cashman Photo v. Nevada Gaming Comm’n.*, [91 Nev. 424](#), 428, 538 P.2d 158 (1975). As the court explained in the *Cashman* decision, revenue statutes cannot be extended by implication to matters not mentioned in the legislation. *See id* at 428, 538 P.2d at 158. *Accord Gould v. Gould*, 245 U.S. 151 (1915).

Applying these legal principles to the subject mining claim fee statute indicates that the fee may not be collected upon the filing of a notice of intent to hold document. The subject statute expressly enumerates the types of filings upon which the fee may be collected. This statute does not authorize collection of the fee upon the filing of a notice of intent to hold document. In fact, Nevada law does not even recognize such a document which is a creature of federal law. When the subject mining claim fee was enacted and amended by the Nevada Legislature in 1983 and

1985, respectively, the notice of intent to hold document existed under federal law. The Nevada Legislature is presumed to have known of this difference between federal and Nevada law relative to mining claims. Despite the extensive amendment to Chapter 517 of the Nevada Revised Statutes by the 1985 session, the Legislature elected not to enact a state law provision for notices of intent to hold a mining claim such as that contained in federal law.

Strict construction of this revenue generating legislation necessitates the conclusion that the Legislature did not intend to place a fee upon the filing of a document which is not even recognized by state law. The courts would not recognize an implied “tax” in these circumstances. This conclusion is supported by the apparent public policy of notices of intent to hold a mining claim. Under federal law, the filing of this document preserves a mining claim for a period of time immediately following the claim process without the necessity of completing labor or improvements. By so doing, a nascent claim is not financially burdened until the claimant has adequate time to determine profitability of the claim. The Nevada Legislature reasonably could have concluded that these types of developing claims should not be subjected to the mining claim filing fees.

CONCLUSION

Nevada law does not permit a county recorder to collect a fee under chapter 489 of the 1985 Statutes of Nevada for the filing of a notice of intent to hold a mining claim, mill site or tunnel right in order to preserve the owner’s interests under federal law. State statute does not recognize the notice of intent to hold document as a method of protecting an owner’s interest under Nevada law. Consequently, the Attorney General concludes that the legislature did not intend to exact revenue from the recordation of a document not required by state law.

QUESTION TWO

Whether section 2.6 of Chapter 489 of the 1985 Statutes of Nevada permits a county recorder to collect the authorized fee for each claim referenced in an amended certificate of location filed under section 517.200(3) of the Nevada Revised Statutes in order to correct a common error in multiple claims.

ANALYSIS

State statute prescribes that, “[w]here a common error occurs, in more than one certificate of location, the locator may record one document which describes the error, makes reference to the claims by name and the date, book and page of recording and states the desired amendment.” [NRS 517.200\(3\)](#) (1985), *as amended by*, 1985 Nev. Stat., ch. 489 § 18, at 1712. [NRS 517.200\(3\)](#) permits the locator of a mining claim to file a single amended certificate of location to correct a common error affecting multiple claims.

The mining claim fee authorized by section 2.6 of Chapter 489 of the 1985 Statutes of Nevada must be collected on the basis of the “claims” affected by the filing with the county recorder. This fee, therefore, must be collected for each claim referenced in the consolidated amended certificate of location recorded under [NRS 517.200\(3\)](#). A conclusion to the contrary by the Attorney General would disregard the plain and unambiguous language of the statute which indicates the fee is to be collected on a “per claim” basis. *See, e.g., City of Las Vegas v. Macchiaverna*, [99 Nev. 256](#), 257-258, 661 P.2d 879 (1983).

CONCLUSION

Review of the statute imposing the mining claim fee demonstrates an unambiguous

legislative direction that the fee be collected for the filing of certain documents on a “per claim” basis. Accordingly, a county recorder must collect the authorized fee for each claim referenced in an amended certificate of location recorded pursuant to [NRS 517.200\(3\)](#).

QUESTION THREE

Whether section 2.6 of Chapter 489 of the 1985 Statutes of Nevada permits a county recorder to collect the authorized fee upon the filing of any document which may effect the recordation of a single claim.

ANALYSIS

The mining claim fee authorized by the 1985 Nevada Legislature may be collected only upon the recordation of seven expressly enumerated documents. As delineated above, these documents are (1) lode claim certificates of location; (2) lode claim relocation certificates; (3) placer claim certificates of location; (4) mill site certificates of location; (5) tunnel right certificates of location; (6) amended certificates of location; and, (7) affidavits of labor or improvements. *See text at 2, supra.* Chapter 489 of the 1985 Statutes of Nevada does not authorize the collection of the seventy-five cent fee on any other mining claim document recordations. Likewise, this statute does not excuse payment of the fee merely because a single claim may require the recordation of several of the enumerated documents.

CONCLUSION

The mining claim fee imposed under Nevada law may be collected upon recordation of seven expressly enumerated documents. A county recorder may neither collect this fee for filing other mining claim documents nor excuse payment of the fee because several of the enumerated documents must be filed with respect to a single claim.

QUESTION FOUR

Whether section 2.6 of Chapter 489 of the 1985 Statutes of Nevada permits a county recorder to collect the authorized fee upon the filing of documents pertaining to mill sites, tunnel rights and placer claims.

ANALYSIS

As explained above, the mining claim fee imposed by Chapter 489 of the 1985 Statutes of Nevada must be collected by the respective county recorders upon the filing of a placer claim certificate of location, a mill site certificate of location, a tunnel right certificate of location and any amended certificate of location related to placer claims, mill sites of tunnel rights. *See text at 2 and 5, supra.*

CONCLUSION

Chapter 489 contemplates the collection of the authorized mining claim fee for recordation of certificates of location related to placer claims, mill sites and tunnel rights. This fee must also be collected for amended certificates of location pertaining to placer claims, mill sites and tunnel rights.

QUESTION FIVE

Whether section 2.6 of Chapter 489 of the 1985 Statutes of Nevada requires the respective county recorders to collect the authorized fee for members of an association placer claim.

ANALYSIS

The mining claim fee authorized by the 1985 Nevada Legislature must be imposed by the county recorder upon the filing of a location certificate for a placer claim as required by section 517.100(1) of the Nevada Revised Statutes. This statute provides in relevant part that:

When the locator files his maps pursuant to [NRS 517.100](#), he shall present to the county recorder for recording, together with the usual recording fees, duplicate certificates which state:

- (a) The name of the claim, designating it as a placer claim.
- (b) The name of the locator or locators and the post office address of each.
- (c) The date of location.
- (d) The number of feet or acres claimed.

[NRS 517.110](#)(1) (1985).

Neither the mining claim fee statute nor [NRS 517.110](#)(1) contains any language which indicates a legislative direction to collect fees or require separate location certificates from each person participating in a mining corporation, association or partnership. By contrast, Nevada statute does contain a legislative recognition of the ability of individuals to form mining corporations, associations and partnerships in order to share the profits and expenditures of operating mining claims. See [NRS 520.010](#)-520.260 (1979), as amended by, 1985 Nev. Stat., ch. 445, § 69, at 1487.

CONCLUSION

The mining claim fee imposed upon the recordation of placer claim certificates of location may not be collected for each member of an association operating such a claim. Instead, the fee must be collected on a “per claim” basis whether the claim is held by an individual, association, corporation or partnership.

Sincerely,

Brian McKay, *Attorney General*

By Dan R. Reaser, *Attorney General*,
Civil Division

OPINION NO. 85-19 Meetings of State and Local Agencies; Legality of Licensing Decisions Rendered by Mail—Nevada law prohibits the members of a public body from rendering a licensing decision by a mail poll. See [NRS 241.010](#)-241.040 and 590.495 (1985).

CARSON CITY, December 17, 1985

MR. KEN STRUNK, Nevada Board for the Regulation of Liquefied Petroleum Gas, Post Office Box 338, Carson City, Nevada 89702

DEAR MR. STRUNK:

This letter is in response to your request for an opinion of the Attorney General concerning the propriety of the Nevada Board for the Regulation of Liquefied Petroleum Gas rendering a licensing decision by mail ballot. The question presented by your inquiry involves an important issue related to the application of the Nevada open meeting law. See [NRS 241.010](#)-241.040 (1985).

The opinion request letter from your agency which precipitated this correspondence contained the following relevant discussion, namely:

The board is charged with the issuance of 5 classes of licenses to do propane sales and service in Nevada. Since the board meets only three times a year, a more expeditious method of Class 2 through 5 approval was needed. Many years ago a mail around approval system was started. An application with fees and plot plans came by mail into my office. I do on site inspections and interviews and recommend to the board approval or disapproval of the license by signature on a form we created, which then is sent to the board chairman and on to the other board members and subsequently back to me where a license is issued for one year. The approved license is read into the minutes of the next board meeting and approved by voice vote. See Letter to Dan Reaser from Ken Strunk (dated July 11, 1985).

Additionally, the board has advised the Attorney General of two other relevant facts. First, the mail poll system utilized by the board has operated continuously since being originally implemented. Second, because the board is funded exclusively from user fees, the board has operated under the assumption that the open meeting law did not apply to the deliberations of the board.

QUESTION

Whether Nevada law permits the members of a public body to render a licensing decision by a mail poll where the involved public body is statutorily limited in the number of regular annual meetings which may be conducted by that public body.

ANALYSIS

Nevada law governing the conduct of meetings of state and local agencies provides that:

[T]he legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

...
Except as otherwise specifically provided by statute, all meetings of public bodies shall be open and public, and all persons shall be permitted to attend any meeting of these bodies.

[NRS 241.010](#) and [241.020](#)(1) (1985).

Chapter 241 of the Nevada Revised Statutes, commonly referred to as the Open Meeting Law, defines "meeting" as "the gathering of members of a public body at which a quorum is present to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power." [NRS 241.015](#)(1) (1985). The common meaning of the term "gathering" is to bring together, collect or accumulate and place in

readiness. *See Webster's New Collegiate Dictionary* 475 (1975). In the apparent absence of any generally accepted technical, legal or commercial interpretation, the common meaning of the term "gathering" should be recognized as controlling. *See, e.g., Orr Ditch & Water Co. v. Justice Court*, [64 Nev. 138](#), 149-150, 178 P.2d 558 (1947); *Comstock Mill & Mining Co. v. Allen*, [21 Nev. 325](#), 331 (1892). *See generally* 2A N.J. Singer, *Sutherland Statutory Construction* §§ 47.27-47.31 (4th Ed. 1984). Accordingly, a "gathering" of members of a public body within the conception of an open meeting would include any method of collecting or accumulating the deliberations or decisions of a quorum of these members.

In order for a "gathering" to constitute a public meeting governed by the Open Meeting Law there must also be a quorum of the public body present to conduct business. A quorum is statutorily defined as "a simple majority of the constituent membership of a public body or another proportion established by law." [NRS 241.015\(3\)](#) (1985). Decisional law has construed the adjective "present" to mean "being in view or immediately at hand; being within reach, sight or call; being in a certain place and not elsewhere; ready at need." 72 C.J.S. *Present* 491 (1951). Presence may be either actual or constructive. *State v. Hickman*, 189, So.2d 254, 258 (Fla.App. 1966). *See, e.g., Johnson v. Bussey*, 95 S.W.2d 990, 992 (Tex.Ct.Civ.App. 1936); *Seals v. State*, 73 S.W.2d 528, 529-530 (Tex.Ct.Crim.App. 1934). *See also* 16D C.J.S. *Constructive* 708-709 (1985). The quorum of the membership of a public body is constructively present whenever the attendant facts, circumstances and conduct demonstrate that these individuals should be deemed by the law as being together for the purpose of conducting the business of the public.

For that reason, this office has concluded that while the membership of a public body may not be "in view or immediately at hand," a lawful public meeting may be nevertheless conducted by telephone conference. *See* Office of the Attorney General, *Nevada Open Meeting Law Manual* 18 (4th Ed. Oct. 1983). Similarly, where, as in this case, the members of a public body agree that action will be taken by that body through the use of a predetermined mail poll procedure, the members of the public body should be treated by the law as "present" to conduct business. This conclusion is especially warranted in circumstances such as are presently considered where the members have consented in advance to be ready in mind, if not physically, to deliberate and decide public business in private without the statutorily mandated scrutiny of a public meeting. *Cf.* Attorney General's Opinion No. 1-4 (Jan. 29, 1985) (telephone poll of individual members of public body by staff without membership's knowledge that balloting treated as decision not violative of open meeting law). Any other interpretation of the Open Meeting Law would sanction what should be ostensibly an informal conference which "permits crystallization of secret decisions to a point just short of ceremonial acceptance." *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal.Rptr. 480, 487 (App.Ct. 1968). This office has repeatedly opposed any subterfuge of this type as a means of circumventing the Open Meeting Law. *See* Office of the Attorney General, *Nevada Open Meeting Law Manual* 11-13 (4th Ed. Oct. 1983). Under these circumstances, a mail balloting by the public body would constitute a meeting within the statutory purview of [NRS 241.015\(1\)](#). Furthermore, a mail balloting of this type frustrates the legislative purpose of Chapter 241 of the Nevada Revised Statutes as stated in [NRS 241.010](#).

The Nevada Open Meeting Law likewise defines a "public body" as any nonexempt "administrative, advisory, executive or legislative body of the state or local government which expends or disburses or is supported in whole or in part by tax revenue, . . ." [NRS 241.015\(2\)](#) (1985). In *State v. Fogus*, [19 Nev. 247](#) (1885), the Supreme Court of the State of Nevada ruled that tax revenue would broadly "include fees, costs, and all other pecuniary burdens imposed upon the people under authority of law." *Id.* at 249. The ruling of the *Fogus* decision on this principle of law remains persuasive to courts nearly a century later. *See, e.g., Staub v. Harris*, 626 F.2d 275, 278 (3rdCir. 1980); *State Highway Comm'n v. City of Topeka*, 393 P.2d 1008, 1010 (Kan. 1964); *Colen Grain Mercantile, Inc. v. Texas Grain Sorghum Prod. Bd.*, 519 S.W.2d 620, 623 (Tex. 1975). Consequently, the Attorney General has repeatedly concluded that a

public body, such as the Board for the Regulation of Liquefied Petroleum Gas, which is fiscally supported by fees upon the regulated industry or profession, is a public body subject to the mandates of the Open Meeting Law. *See* Attorney General's Opinion No. 1-2 (Nov. 20, 1979) (Board of Dental Examiners); Attorney General's Opinion No. 1-2 (Sept. 1, 1977) (Board of Architecture); *Cf.* [NRS 590.505](#)(9) and 590.555(3) (1985) (funding source for Liquefied Petroleum Gas Board).

Based upon the foregoing analysis, the Attorney General has concluded that "the making of a decision by a mail poll which is not subject to public attendance appears inconsistent with both the spirit and intent of the law." *See* Office of the Attorney General, Nevada Open Meeting Law Manual 18 (4th Ed. Oct. 1983). This assessment by the Attorney General is based upon two factors. First, the Nevada Legislature has declared that as a matter of public policy the actions and deliberations of public bodies will be conducted openly. [NRS 241.010](#) (1985). Second, a statute promulgated for the public benefit such as a public meeting law should be liberally construed and broadly interpreted to promote openness in government. Conversely, any exceptions contained in such a "sunshine law" should be strictly construed. *See Laman v. McCord*, 432 S.W.2d 753, 755 (Ark. 1968); *City of Miami Beach v. Berns*, 245 So.2d 38, 40 (Fla. 1971); *Wolfson v. State*, 344 So.2d 611, 613 (Fla.App. 1977); *Wexford County Prosecuting Attorney v. Pranger*, 268 N.W.2d 344, 348 (Mich.App.1978). Moreover, a construction which frustrates all evasive devices is preferred for the interpretation of an open meeting law. *See Florida Parole and Probation Comm'n v. Thomas*, 364 So.2d 480, 481 (Fla.App. 1978).

In light of this conclusion of the Attorney General, two matters arise concerning the operation of the Board for the Regulation of Liquefied Petroleum Gas. The Open Meeting Law provides that, "[t]he action of any public body taken in violation of any provision of [chapter 241] is void." [NRS 241.036](#) (1985). Because the board has affirmed the results of the mail balloting license decisions at a subsequent public meeting conducted in compliance with the Open Meeting Law, the licenses initially approved by the mail poll procedure are not void.

An additional concern arises in light of the fact that the Board for the Regulation of Liquefied Petroleum Gas is permitted by statute to conduct only three regular meetings annually. *See* [NRS 590.495](#)(1) (1985). If licensing decisions may only be made at these regularly conducted public meetings, the licensing duties of the Liquefied Petroleum Gas Board may be hampered. The board, however, is not limited to rendering licensing decisions only at these regular meetings. Special meetings may be effected in person or by a telephone conference procedure. *See* [NRS 590.495](#)(2) (1985); Office of the Attorney General, Nevada Open Meeting Law Manual 18 (4th Ed. Oct. 1983). While neither the special meeting nor the telephone conference call meeting procedure may be necessary, these options are available to the board and would permit expeditious review of license applications without contravening the mandates of the Open Meeting Law.

CONCLUSION

Nevada law governing the conduct of meetings of state and local government agencies prohibits a public body from using mail balloting or mail polls in order to deliberate toward or actually render decisions. The Board for the Regulation of Liquefied Petroleum Gas may not employ such a mail balloting procedure in order to make licensing decisions. Both the Open Meeting Law and the statutes governing the board contain sufficient flexibility that alternative procedures may be fashioned to efficiently perform the public obligations of the board.

Sincerely,

BRIAN MCKAY, *Attorney General*

By DAN R. REASER, *Deputy Attorney General,*
Civil Division

OPINION NO. 85-20 Adoption—An Indian social services agency must notify the Nevada State Welfare Division prior to placing a child for adoption off the reservation of Nevada.

CARSON CITY, December 23, 1985

MRS. APRIL WILSON, *Deputy Administrator for Social Services,* Welfare Division, 2527 North Carson Street, Capitol Complex, Carson City, Nevada 89710

DEAR MRS. WILSON:

This is in response to your request for a legal opinion.

QUESTION

Is the action of the social services agency of the Pyramid Lake Indian Tribe in placing a child off the reservation for adoption within the jurisdiction of the Indian tribe?

ANALYSIS

Initially, it should be noted that the Tribal Council at Pyramid Lake Reservation has adopted the Nevada Revised Statutes in matters not covered by the Tribal Code. The Tribal Code does not specifically address adoptions and placements. With this in mind, [NRS 127.280](#) provides, in relevant part:

1. No child may be placed in the home of prospective adoptive parents for the 30-day residence in that home which is required before the filing of a petition for adoption, . . . , unless the welfare division receives written notice of the proposed placement from:

- (a) The prospective adoptive parents of the child;
- (b) The person recommending the placement; or
- (c) A licensed child-placing agency and the investigation required by the provisions of this section has been completed.

...
4. Pending completion of the required investigation, the child must be retained by the natural parent or parents or relinquished to the welfare division and placed by the welfare division in a foster home licensed by it until a determination is made by the welfare division concerning the suitability of the prospective adoptive parents.

...
8. Any person who places, accepts placement of, or aids, abets or conceals the placement of any child in violation of the placement provisions of this section, is guilty of a gross misdemeanor.

As a general rule, an Indian tribe has jurisdiction over occurrences on Indian land. However, this is not necessarily so as to occurrences off Indian land.

The Indian social services agency in question is not licensed by the State to place children for adoption within the State of Nevada. Where this agency places children for adoption in Nevada

outside Indian country without complying with the placement provisions of State statute, serious impediments to the adoption process may occur. See [NRS 127.280](#) (1983).

In a Nevada civil case, *Vorhees v. Spencer*, [89 Nev. 1](#), 504 P.2d 1321 (1973), the Nevada Supreme Court stated: “[A]bsent congressional prohibition, if the evidence or matter in controversy which calls for judicial action arises outside Indian country, Indians are subject to the laws of the jurisdiction involved. In re Wolf, 27 Fed. 606 (W.D.Ark. 1886); Ex Parte Moore, 28 S.D. 339, 133 N.W. 817 (1911) . . .”

In the recent case of *Mescalero Apache Tribe v. State of New Mexico*, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611, (1983), the United States Supreme Court said at 103 S.Ct. 2386: “State jurisdiction is preempted by operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of state authority.” [Citations omitted.]

In *Mescalero*, supra, the court was dealing with regulations the State was attempting to impose on Indian land. However, even in this context, the court said: “A State’s regulatory interest will be particularly substantial if the State can point to off reservation effects that necessitate intervention.” [Citations omitted.]

Mescalero is distinguishable from the situation we are dealing with in that the State of Nevada is not attempting to regulate on-reservation activities of the Indian tribe. The State of Nevada is regulating the placement of children for adoption on State land which is not part of an Indian reservation.

In *Odenwalt v. Zaring*, 624 P.2d 383 (Idaho 1980), the court held that the state had jurisdiction over a tort occurring off the reservation. The court quoted from *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149, 93 S.Ct. 1267, 1279, 36 L.Ed.2d 114 (1973), as follows:

It was similarly noted in *Vorhees v. Spencer*, [89 Nev. 1](#), 504 P.2d 1321, 1323-24 (1973), that “[a]bsent congressional prohibition, if the evidence or matter in controversy which calls for judicial action arises outside of Indian country, Indians are subject to the laws of the jurisdiction involved. . . . Indians have access to the state courts, and the State may regulate their activities outside Indian country, even though they are members of a Tribe and reside on a reservation.

A.B.M. v. M.H., 651 P.2d 1170 (Alaska 1982), cert. den. 103 S.Ct. 1893, was a case in which an Indian mother placed her child, R.H., for adoption with her sister and brother-in-law, who resided off the reservation. The decree of adoption was entered after proceedings in state court conducted pursuant to the Indian Child Welfare Act. Subsequently, the adoption was set aside because the State Department of Health and Social Services, Division of Family and Youth Services, had not been notified of the adoption proceedings as required by state statute and had thus been deprived of an opportunity to investigate the suitability of R.H.’s prospective home, which was off the reservation.

The same situation pertains here. The Indian social services agency has placed a child off the reservation for adoption without notifying the Nevada State Welfare Division. The Nevada State Welfare Division is thereby deprived of the ability to investigate the suitability of the home as required by State law. [NRS 127.280](#). It is to be noted that adoptive placements in Nevada by other states are treated in the same way. The Welfare Division must be given notice of the placement and an opportunity to do a home study. Thus, the Indian tribe is treated the same as another state.

The question with which we are dealing in this opinion involves activities off the reservation.

In *De Coteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), reh. den. 421 U.S. 939, the court held that because the Indians no longer owned land which had once been part of their reservation (they having ceded it to the United States), the South Dakota state courts have civil and criminal jurisdiction over conduct of members of the tribe on the non-

Indian, unallotted lands within the 1867 reservation borders. It follows that, under that case, acts of Indians performed off the reservation are subject to state jurisdiction.

It is interesting to note that *De Coteau* involved a child custody proceeding, where under the Indian Child Welfare Act of 1978 the results might have been different. However, the general principle that acts off the reservation are subject to State jurisdiction would seem to apply here, in the absence of a contrary provision in the Indian Child Welfare Act of 1978.

From the foregoing court decisions, it is concluded that the Indian Social Services Agency may not place children off the reservation in contravention of [NRS 127.280](#) unless Congress has provided otherwise. This leads us to a perusal of the Indian Child Welfare Act of 1978. In 78 U.S. Code Cong. & Adm. News, which supplies legislative history of the act, at page 7536, *U.S. v. Nice*, 241 U.S. 591 (1916), was quoted as follows:

The power of Congress to regulate or prohibit traffic with tribal Indians within a state whether upon or off an Indian reservation is well settled. . . . Its source is twofold; first, the clause of the Constitution expressly investing Congress with authority to regulate commerce . . . with the Indian tribes; and, second, the dependent relation of such tribes to the United States.

The Indian Child Welfare Act, found at 25 U.S.C. § 1902, reads:

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

The Indian Child Welfare Act provides at Sec. 101(a) (25 U.S.C. § 1911) as follows:

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

It is clear from this statute that the tribe has jurisdiction over Indian children residing or domiciled on the reservation. It is also clear that the tribal court retains jurisdiction over an Indian child who is an express ward of the court, regardless of residence or domicile. This is analogous to the jurisdiction of the juvenile court in Nevada, where a child who is a ward of the court is placed in an out-of-state facility. The court retains jurisdiction.

It should be noted that in a child-placing situation for purposes of adoption the child is not a ward of the court. Rather, the child is in the custody of a social service agency. The social services agency is not the tribal court and so it is clear the social services agency can retain jurisdiction only over the Indian child that resides or is domiciled on the reservation. By placing a child off the reservation, the social services agency loses jurisdiction because the child no longer “resides” on the reservation.

Since the object of the Indian Child Welfare Act is to preserve Indian culture, heritage and family and tribal ties, without specific authorization by Congress providing for Indian social service agency adoptive placements off the reservation, it would appear that the Indian social service agencies do not have the authority to place Indian children off the reservation, and this is particularly true with respect to placements with non-Indians. Since there is no Congressional

grant of authority to the tribes to place children for adoption off the reservation, the tribe must comply with the laws of the jurisdiction in which placement is sought.

CONCLUSION

The Indian social services agency does not qualify as a child-placing agency under Nevada law. Since they are not licensed as a child-placing agency in the State of Nevada, the placement of children off the reservation for adoption in Nevada must be brought to the attention of the Nevada State Welfare Division for review pursuant to [NRS 127.280](#). AS noted previously, this same requirement is imposed on any other state placing a child in Nevada for adoption. The reciprocal situation is also true. The State of Nevada should notify the tribe prior to placement of any child for adoption on the reservation. Additionally, any adoption completed on the reservation by the tribal court is valid and its validity should be recognized by state authorities.

Sincerely,

BRIAN MCKAY, *Attorney General*

By NANCY FORD ANGRES, *Deputy Attorney General,*
Welfare Division
